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**DotMusic Presentation to  
ICANN Board Governance Committee**

**September 17, 2016**

**Presentation by Arif H. Ali, Dechert LLP,  
Washington, D.C.**

## **BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws**

- In performing its duties of reconsideration, the BGC must:
  - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

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## **BGC Must Address the EIU's Discrimination Against DotMusic**

- The EIU Panel singled out DotMusic for disparate treatment.
  - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
    - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
  - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

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- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
  - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
  - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
  - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

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- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
  - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
  - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
  - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

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## **EIU Also Failed To Act Fairly and Openly**

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
  - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
  - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
  - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

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## **Presentation by Dr. Jørgen Blomqvist**

**Honorary Professor in International Copyright,  
University of Copenhagen, Denmark**

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**Statement of Dr. Richard Burgess  
Ph.D. in Ethnomusicology**

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**Concluding Remarks  
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