

DotMusic Reconsideration Request (“RR”)

1. Requester Information

Name: DotMusic Limited (“DotMusic”)¹

Address: Contact Information Redacted

Email: Constantine Roussos, Contact Information Redacted

Counsel: Jason Schaeffer, Contact Information Redacted

Name: International Federation of Musicians² (“FIM”)

Email: Benoît Machuel, Contact Information Redacted

Name: International Federation of Arts Councils and Culture Agencies³ (“IFACCA”)

Email: Sarah Gardner, Contact Information Redacted

Name: Worldwide Independent Network⁴ (“WIN”)

Email: Alison Wenham, Contact Information Redacted

Name: Merlin Network⁵ (“Merlin”)

Email: Charles Caldas, Contact Information Redacted

Name: Independent Music Companies Association⁶ (“IMPALA”)

Email: Helen Smith, Contact Information Redacted

Name: American Association of Independent Music⁷ (“A2IM”)

Email: Dr. Richard James Burgess, Contact Information Redacted

Name: Association of Independent Music⁸ (“AIM”)

Email: Charlie Phillips, Contact Information Redacted

Name: Content Creators Coalition⁹ (“C3”)

Email: Jeffrey Boxer, Contact Information Redacted

Name: Nashville Songwriters Association International¹⁰ (“NSAI”)

Email: Barton Herbison, Contact Information Redacted

Name: ReverbNation¹¹

Email: Jean Michel, Contact Information Redacted

¹ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

² <http://fim-musicians.org/about-fim/history>

³ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁴ <http://winformusic.org/win-members>

⁵ <http://merlinnetwork.org/what-we-do>

⁶ <http://impalamusic.org/node/16>

⁷ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁸ <http://musicindie.com/about/aimmembers>

⁹ <http://c3action.org>

¹⁰ <https://nashvillesongwriters.com/about-nsai>

¹¹ <https://reverbnation.com>

2. Request for Reconsideration of: X Board action/inaction X Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On April 29, 2016, DotMusic submitted a Documentary Information Disclosure Policy (“DIDP”) Request 20160429-1¹² (the “Request”) requesting documentary information for six (6) Items (the “Items”) relating to (i) the Community Priority Evaluation (“CPE”) process and quality control process; (ii) the CPE Report and CPE process of DotMusic’s application for the .MUSIC gTLD (Application ID: 1-1115-14110), including the CPE Panel’s names; (iii) the CPE Reports and CPE process of .HOTEL, .RADIO, .OSAKA, .SPA, .ECO and .GAY community applications; (iv) the Applicant Guidebook (“AGB”) Change Request policy development process; and (v) the appearance of conflicts of interest.

If ICANN denied the disclosure of the Items and documents requested based on public interest grounds, DotMusic requested ICANN: (i) to define “*public interest*” with respect to the DIDP process and explain in detail how “*the harm in disclosing the information outweighs the public interest in disclosing the information;*” (ii) to provide DotMusic with privileged logs that clearly describe as to each document withheld: the type of document, the general subject matter thereof, the date on which it was created, the authors of the document, all parties who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law that recognizes such claim of privilege; and (iii) to follow the ICANN Board Resolutions of March 10, 2016 to “*be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents.*”¹³

First, it bears noting that on April 12th, 2016, the ICANN Board responded to the GNSO’s query concerning ICANN’s definition of the “*public interest.*” ICANN Chairman Dr. Steve Crocker clarified that “*historically at ICANN, there has been no explicit definition of the term “global public*

¹² DotMusic DIDP Request 20160429-1, April 29, 2016, <https://www.icann.org/resources/pages/didp-20160429-1-dotmusic-request-2016-05-19-en> and <https://icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>, DIDP Ex.A97. For Exhibits, see <https://icann.box.com/shared/static/ghks27k7xk1xrvl1xj04faidv3wmgr5n.pdf>

¹³ ICANN Board Resolution, March 10, 2016, <https://icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>, DIDP Ex.A5

interest” and that “*future conversation and work on exploring the public interest within ICANN’s remit will require global, multistakeholder, bottom-up discussion.*”¹⁴ According to ICANN:

I. Board interpretation and consideration of the public interest
While, historically at ICANN, there has been no explicit definition of the term “global public interest,” the Board has understood the term within the context of Paragraph 3 of the Articles of Incorporation: “*In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).*”¹⁵

According to ICANN’s DIDP “*Defined Conditions of Nondisclosure:*”¹⁶

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

Disclosure of the documents requested by DotMusic under the DIDP process did not impact nor influence the “operational stability of the Internet.” As such, ICANN’s interpretation and consideration of the *public interest* as it applies to Article 3 of ICANN’s Articles of Incorporation does not apply to DotMusic’s DIDP Request. Furthermore, the Article 2 of the amended and restated ICANN Articles of Incorporation draft (as of May 25, 2016) explicitly states that the “*global public interest may be determined from time to time by the multistakeholder community through an inclusive bottom-up multistakeholder community process, by carrying out the mission set forth in the bylaws of the Corporation (“Bylaws”).*”¹⁷ ICANN and the multi-stakeholder community have never defined the *public interest* within the context of the DIDP process.

¹⁴ Dr. Steve Crocker, ICANN Chair, ICANN Board Response to GNSO Query on Public Interest, <https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-12apr16-en.pdf>, p.1 and p.3, DIDP Ex.A73

¹⁵ Ibid, pp.1-2, DIDP Ex.A3; Also see Article 3 of ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, DIDP Ex.A45; ICANN does not explicitly define the “*global public interest*” in the new Bylaws. See new Bylaws and announcement by ICANN Board, <https://www.icann.org/news/blog/new-icann-bylaws>, DIDP Ex.A102.

¹⁶ See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>, DIDP Ex.A3

¹⁷ Amended and restated ICANN Articles of Incorporation draft, <https://www.icann.org/en/system/files/files/draft-restated-articles-incorporation-25may16-en.pdf>, DIDP Ex.

ICANN's DIDP Response¹⁸ denied the Items and documents requested in the Request. Furthermore, ICANN dismissed DotMusic's request for ICANN to define the *public interest* with respect to the DIDP process and how the *public interest* test or rationale was applied for all the Items that were denied. ICANN did not provide any details or the specific formula used to justify ICANN's position that "*the harm in disclosing the information outweighs the public interest in disclosing the information*" for each Item specifically. ICANN's withholding of information under the principle of *public interest* is contrary to the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws, especially when ICANN did not define *public interest* in relation to the DIDP Request. In its DIDP Response, ICANN "*has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships, and its contractors' deliberative processes by the requested disclosure.*" In context, the ICANN Board Governance Committee ("BGC") cannot conclude that there was a substantive disagreement with ICANN's DIDP Response when, on one hand, ICANN Staff was unable to define *public interest* and, on the other hand, ICANN Staff's rationale to reject disclosure of Items and documents requested were based on *public interest* grounds. It appears it is within ICANN's sole discretion to determine whether or not the *public interest* in the disclosure of responsive documents that fall within one of the Conditions of Nondisclosure outweighs the harm that may be caused by such disclosure.

In the event that there was a compelling reason not to disclose information, DotMusic requested ICANN provide detailed privilege logs for each Item withheld. Despite the fact that the DIDP rules allow ICANN Staff to create or compile summaries of any documented information, including logs of documents withheld under one of the Conditions of Nondisclosure, this request was also denied.

ICANN's default policy is to release all information requested unless there is a compelling reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request.

ICANN is "*no ordinary non-profit.*" ICANN is a "*regulatory authority of vast dimension and pervasive global reach.*" The origin of ICANN's authority relies upon ICANN's Affirmation of

¹⁸ ICANN DIDP Response to DotMusic DIDP Request 20160429-1, May 15, 2016, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>, DIDP Ex.A98

Commitments (“AOC”) with the United States Department of Commerce with a key commitment to “ensure” that “*decisions are made in the public interest and are accountable and transparent.*”¹⁹

Requesters of this DIDP Reconsideration Request (“DIDP RR”) request the ICANN BGC to (i) determine that ICANN Staff violated established procedures and (ii) order disclosure of all the Items requested in the DIDP Request (including the provision of privilege logs for each item in the event that ICANN denies such disclosure) in accordance with ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability) and ICANN’s Affirmation of Commitments to serve the global public interest. If the BGC determines that there is a substantive disagreement between ICANN Staff and Requesters (there is none because the Requesters could not disagree with the requested *public interest* definition and test because they were not provided by ICANN Staff in relation to the DIDP process) then the Requesters request the BGC to transparently define *public interest* and provide the *public interest* test rationale in relation to the DIDP process for clarification purposes.

4. Date of action/inaction: May 15, 2016

5. On what date did you become aware of action or that action would not be taken?

May 15, 2016

6. Describe how you believe you are materially affected by the action or inaction:

ICANN’s actions and inactions materially affect the ICANN community, the delineated and organized music community defined in DotMusic’s application with members representing over 95% of global music consumed (an overwhelming majority) (the “Music Community”) and Internet users in general because: (i) ICANN has not functioned in an accountable, transparent and open manner with respect to the DIDP Request; and (ii) ICANN has wasted significant resources resulting in vast financial expenditures (amounting to millions of dollars) to defend ICANN’s position and react to the majority of accountability mechanisms invoked which related to the CPE process. These CPE-related accountability mechanisms invoked by harmed applicants were predictable and would have been prevented if ICANN incorporated the mandatory and proactive quality control process that community applicants relied upon to ensure that community applications were graded consistently

¹⁹ ICANN and U.S Department of Commerce Affirmation of Commitments, <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>, Section 3, DIDP Ex.A47

and fairly as well as to ensure there was no discrimination against applicants at the gain of their competitors.

(i) An independent, accountable, open and transparent CPE and quality control process to ensure consistency:

All Internet users, domain registrants, the Music Community, members of the ICANN community, and in particular anyone working at understanding the CPE process, will be materially affected if the ICANN Staff predisposition for nondisclosure is maintained and supported by the BGC in its DIDP RR determination. Absent of an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN.

Accountability, transparency and openness are key components of ICANN’s self-identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System (“DNS”). The ICANN Board passed Resolutions on March 10, 2016 to “*be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents.*”²⁰ Furthermore, the ICANN Board passed Resolutions on May 15, 2016, in an effort in enhancing openness and transparency in Board deliberations. The “*Board believes that providing increased access to Board deliberations is important, and that increased openness is an important means of working toward that goal.*” The “*effort to enhance openness is likely to also support the ICANN community in enhancing ICANN’s accountability, as it will reduce questions of how and why the Board reaches its decisions.*”²¹

Resolved (2016.05.15.13), the Board directs the President and CEO, or his designee(s), to work with the Board to develop a proposed plan for the publication of transcripts and/or recordings of Board deliberative sessions, with such plan to include an assessment of possible resources costs and fiscal impact, and draft processes to: (i) ensure the accuracy of the transcript; and (ii) for redaction of portions of the transcript that should be maintained as confidential or privileged.

Resolved (2016.05.15.14), the Board expects to evaluate the plan in Helsinki, and if satisfactory to begin testing of the proposed processes relating to publication of transcripts and/or recordings of the Board’s deliberative sessions as soon as practicable after Helsinki.²²

²⁰ ICANN Board Resolution, March 10, 2016, <https://icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>, DIDP Ex.A5

²¹ ICANN Board Resolutions, 2016.05.15.13 to 2016.05.15.14, May 15, 2016, *Enhancing Openness and Transparency – Board Deliberations*, <https://icann.org/resources/board-material/resolutions-2016-05-15-en#2.f.i>, 2(f)(i), DIDP Ex.A104

²² Ibid

ICANN’s rationale for these Resolutions aims to “*reduce questions of how and why the Board reaches its decisions. This decision also directly supports ICANN’s previous efforts and the continued goal of operating as openly and transparently in its decision-making*” as set out in Article III, Section 1 of the ICANN Bylaws that “*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*”²³

ICANN’s action and inaction in denying the DIDP Request do not follow these Resolutions, the Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions on the credibility, reliability and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic’s application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 (“CPE RR”)²⁴ that is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested Items and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU’s violation of established processes as set forth in the DotMusic CPE RR. In denying the Items and documents in the DIDP Request, ICANN decreases the possibility of a successful and satisfactory conclusion of the CPE RR (proceedings of which have been placed on hold pending successful, satisfactory and meaningful resolution of the DIDP Request²⁵). In turn, this increases the likelihood of resorting to the expensive and time consuming Independent Review Process (“IRP”) and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws and Affirmation of Commitments. Each member of both the ICANN community and the Music Community will be adversely affected if the Staff

²³ ICANN Bylaws, <https://icann.org/resources/pages/governance/bylaws-en#III>, Article III, Sec. 1, DIDP Ex. A72

²⁴ CPE RR 16-5, <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> and <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>, DIDP Ex.A91

²⁵ ICANN Reconsideration Requests Status Update, *Status Update – 29 April 2016*: “Requester requested that consideration of Reconsideration Request 16-5 be placed on hold pending a response to Requester’s DIDP Request.” See <https://icann.org/en/system/files/files/reconsideration-requests-status-2016-29apr16-en.pdf>, p.1, DIDP Ex. A105

predisposition for nondisclosure is maintained and supported by the BGC in its DIDP RR determination. Absent of an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake.

(ii) Without appropriate quality control, ICANN's allocation of resources in response to preventable accountability mechanisms invoked by applicants creates unnecessary costs at the expense of domain registrants and the ICANN community, the stakeholders who fund those resources:

It is against the global public interest, in particular those that rely on ICANN to responsibly and effectively allocate their resources, if ICANN Staff's predisposition for nondisclosure is maintained and supported by the BGC in its DIDP RR determination.

The highly concerning issue affecting the global public interest, internet users, domain registrants, the Music Community and the ICANN community is the inappropriate and preventable expending and usage of significant and expensive resources by ICANN to respond to accountability mechanisms, such as Reconsideration Requests and IRPs. The invocation of CPE-related accountability mechanisms was predictable and expected. ICANN could have prevented these problematic issues if ICANN was reasonably proactive (rather than reactive) by incorporating the mandatory quality control process pertaining to CPE. The affected ICANN community and Music Community expected that the "somewhat subjective" nature of CPE would require a quality control process under the Quality Control program ("QC"). In fact, each community applicant paid an additional \$22,000 under the promise of an independent, accountable and transparent CPE process, which included quality control. The ICANN DIDP Response to the DotMusic DIDP Request stated:

As specified on page 1 of the SOW, the SOW applies to the EIU's evaluation services for CPE and Geographic Names. As discussed above in response to Item 1, the Quality Control Program was a program that was implemented solely for the Initial Evaluation phase of the New gTLD Program to ensure that all 1930 applications have followed the same evaluation process and have been evaluated consistently. (See <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>) The Quality Control Program did not extend to CPE. Because Geographic Names evaluation was a part of Initial Evaluation, the reference to the Quality Control Program in Paragraph 12 applied to the EIU's evaluation services for Geographic Names, not CPE.²⁶

The "*Preparing Evaluators for the New gTLD Application Process*" page provided by ICANN does not explicitly state that the QC is solely for Initial Evaluation: "*[W]e are implementing a Quality Control program to ensure that applications have followed the same evaluation process and*

²⁶ ICANN DIDP Response to DotMusic DIDP Request, p.12, Exhibit DIDP A98;

have been evaluated consistently...the Quality Control function is a paramount component of the Program. In addition to performing the critical task of ensuring consistency, Quality Control will enable us to identify areas for improvement.” In fact, ICANN has not pointed to any document that states explicitly that the QC does not apply to CPE.

The Requesters note that the first determinations of the Community Objections (“CO”) were released on September 10, 2013.²⁷ The first determinations of the CPE were released half a year later (on March 17, 2014²⁸). As such, ICANN was well-aware of the overarching issue of inconsistent CO and CPE decisions prior to the release of the .MUSIC CPE Report on February 10, 2016. However, ICANN decided to take no action to incorporate a quality control process as mandated in its Statement of Work with the EIU (“SOW”) and the CPE Guidelines (that were finalized on September 27th, 2013), which explicitly stated that “consistency of approach in scoring Applications will be of particular importance” and that “the EIU will fully cooperate with ICANN’s quality control process”²⁹ (emphasis added).

The overwhelming majority of reconsideration request accountability mechanisms invoked between 2013 and the date .MUSIC CPE Report was released (on February 10, 2016) related to community-based COs and CPEs.³⁰ Prior to the release of the .MUSIC CPE Report, there were also IRPs filed pertaining to the .SPORTS, .RUGBY³¹ and the .SPORT community objections.³² Furthermore, preceding the release of the .MUSIC CPE Report, IRPs were also filed pertaining to inconsistent CPE determinations for .INC, .LLC, .LLP,³³ .HOTEL, .ECO,³⁴ .RADIO³⁵ and .SHOP.³⁶

ICANN has admonished requesters in the past, including Commercial Connect and Atgron, over inappropriate expending and usage of ICANN resources:

²⁷ See Community Objection determinations at: <https://newgtlds.icann.org/en/program-status/odr/determination>

²⁸ See CPE Determinations at <https://newgtlds.icann.org/en/applicants/cpe#invitations>

²⁹ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.23, DIDP Ex.A6

³⁰ See ICANN Reconsideration Requests at <https://icann.org/resources/pages/accountability/reconsideration-en>; Between 2007 and 2009 there were no Reconsideration Requests filed with ICANN. In 2010 there were three (3) Reconsideration Requests filed, in 2011 there was one (1), in 2012 there was two (2). In 2013 there were twenty-three (23), in 2014 there forty-six (46), in 2015 there were twenty-two (22) and in 2016 there were six (6) as of May 29th, 2016, DIDP Ex.A110

³¹ See .SPORTS and .RUGBY IRP at <https://www.icann.org/resources/pages/donuts-v-icann-2014-10-13-en>

³² See .SPORT IRP at <https://www.icann.org/resources/pages/dot-sport-v-icann-2015-03-27-en>

³³ See .INC/.LLC/.LLP IRPs at <https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>

³⁴ See .ECO/.HOTEL IRPs at <https://www.icann.org/resources/pages/various-v-icann-eco-hotel-2015-09-02-en>

³⁵ See .RADIO IRP at <https://www.icann.org/resources/pages/afilias-brs-tin-llc-v-icann-2015-10-12-en>

³⁶ See .SHOP IRP at <https://www.icann.org/resources/pages/irp-commercial-connect-v-icann-2016-02-16-en>

...ICANN is charged with using its resources in the public benefit; responding to Atgron's repeated reconsideration requests, when they are based on the same circumstances and do not assert any grounds for reconsideration, is not an appropriate use of those resources.³⁷

...ICANN has expended significant resources engaging with the Requester and responding to the many (and mostly improper) filings described above. Although it is critical that all within the ICANN community have fair access to ICANN's accountability mechanisms, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms.³⁸

For fiscal years 2014 and 2015, ICANN paid Jones Day \$3,964,736³⁹ and \$3,905,497⁴⁰ respectively in legal fees. The majority of those expenses related to community-related decisions. ICANN also paid JAS \$8,183,122⁴¹ and \$1,444,690⁴² for fiscal years 2014 and 2015 respectively to conduct the QC pertaining to Initial Evaluation. However, ICANN did not spend any resources on a community-related quality control process to ensure application consistency, even though community applicants each paid ICANN \$22,000 for CPE in addition to the \$185,000 application fee under the impression that ICANN would follow its processes and agreements.

The Reconsideration Request and Independent Review Process accountability mechanisms are the only recourse for applicants (or impacted requesters) in lieu of litigation.⁴³ As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross

³⁷ ICANN BGC Reconsideration Request Determination 15-8 relating to .WED, June 20, 2015, <https://icann.org/en/system/files/files/determination-15-8-atgron-inc-20jun15-en.pdf>, pp.1 to 2, DIDP Ex.A114

³⁸ ICANN BGC Reconsideration Request Determination 16-1 to 16-2 relating to .SHOP, February 25, 2016, <https://icann.org/en/system/files/files/reconsideration-16-1-et-al-commercial-connect-bgc-determination-25feb16-en.pdf>, p.22, DIDP Ex.A115

³⁹ ICANN, Internal Revenue Service Tax Form 990, FY 2014, Schedule O, <https://www.icann.org/en/system/files/files/fy-2014-form-990-31mar15-en.pdf>, p.71, Exhibit DIDP A94

⁴⁰ ICANN, Internal Revenue Service Tax Form 990, FY 2014, Schedule O, <https://www.icann.org/en/system/files/files/fy-2015-form-990-10may16-en.pdf>, p.68, Exhibit DIDP A95

⁴¹ ICANN, Internal Revenue Service Tax Form 990, FY 2014, Schedule O, <https://www.icann.org/en/system/files/files/fy-2014-form-990-31mar15-en.pdf>, pp.70 to 71, Exhibit DIDP A94

⁴² ICANN, Internal Revenue Service Tax Form 990, FY 2015, Schedule O, <https://www.icann.org/en/system/files/files/fy-2015-form-990-10may16-en.pdf>, p.70, Exhibit DIDP A95

⁴³ The DIDP process is not covered under the AGB's covenant not to sue disclaimer. Also, non-applicants can challenge ICANN in court. According to the AGB: "*Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application.*" See AGB, Application Terms and Conditions, Module 6, Section 6, 6-4, DIDP Ex.A7; Furthermore, a U.S Court decision in California rejected "*the enforceability of the Release due to California Civil Code § 1668.*" See U.S. District Judge R. Gary Klausner, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*, Case No. 16-CV-00862, April 12, 2016, <https://icann.org/en/system/files/files/litigation-dca-icann-motion-prelim-injunction-12apr16-en.pdf>, p.5, DIDP Ex.A83

negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

In a Final Declaration on February 12, 2016, the independent IRP Panel for the .ECO and .HOTEL IRP (“Despegar IRP”) highlighted many of the same serious concerns that DotMusic identified with the CPE process, including the fact that both the EIU and ICANN never established a quality control process as mandated by the EIU-ICANN Statement of Work (“SOW”) and the CPE Materials (including the CPE Guidelines). The independent IRP Panel declared:

[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.⁴⁴...[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.⁴⁵ ...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.⁴⁶ The combination of these statements gives cause for concern to the Panel.⁴⁷ 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.⁴⁸ 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.⁴⁹

These firms will work together in various combinations to evaluate applications during the process as follows: ...Community Priority - The Economist Intelligence Unit and InterConnect Communications...The training program seeks to ensure consistency across all processes and scoring methods so that all applications are evaluated equally. Finally, we are implementing a Quality Control program to ensure that applications have followed the same evaluation process and have been evaluated consistently. I strongly believe that the Quality Control function is a paramount component of the Program. In addition to performing the critical task of ensuring

⁴⁴ Despegar et al v. ICANN, IRP Final Declaration (.ECO/.HOTEL), <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>, ¶ 146, p.37, DIDP Ex.A106

⁴⁵ Ibid, ¶ 147, pp.37-38

⁴⁶ Ibid, ¶ 148, p.38

⁴⁷ Ibid, ¶ 149, p.38

⁴⁸ Ibid, ¶ 150, p.38

⁴⁹ Ibid, ¶ 158, p.39

consistency, Quality Control will enable us to identify areas for improvement. These will in turn create initiatives that will bring enhanced effectiveness to the overall program...⁵⁰

The Quality Program was designed and implemented to both improve and measure consistency/precision, accuracy and process fidelity during the Initial Evaluation phase of the New gTLD Program.⁵¹

As indicated by ICANN's statement in the Despegar IRP, the CPE process did not have a quality control process for CPE despite the subjective nature of the evaluation and decision-making process. Both ICANN and the EIU were also aware that the majority of ICANN's accountability mechanisms pertaining to the New gTLD Program were invoked as a result of either CO (which preceded CPE) or CPE determinations. Given the controversies surrounding the CO and CPE inconsistent decisions, a sophisticated party would reasonably expect and predict that ICANN would have certainly incorporated a quality control process for the .MUSIC CPE as it had during the Initial Evaluation under the QC. Not until the Despegar IRP declaration (in which ICANN stated there was no quality control process) did DotMusic find out that no such CPE quality control process existed. It is clear that ICANN did not address the problem of CPE decision inconsistencies. This resulted in the ICANN expenditure of significant resources and financial expenses to react to inconsistent decisions, which would have been addressed if the quality control process (that was promised and mandated by the ICANN-EIU SOW and CPE Materials) was implemented as expected given that ICANN had already incorporated a quality control process during the other processes relevant to the New gTLD Program, such as the Initial Evaluation process and the Geographic Names evaluation process.

In conclusion, it is clearly grossly negligent that ICANN did not extend the QC to CPE, the most subjective New gTLD Program process. It would be reasonable to assume that the most controversial process of the New gTLD Program (that invoked the most accountability mechanisms) would require the implementation (or continuation) of the Quality Control program for CPE to ensure consistency across all applications and to prevent the unnecessary allocation of significant resources by ICANN to defend accountability mechanisms. Despite the warnings and the filings of the majority of accountability mechanisms that related to CPE, ICANN left the process without quality control, which compromised and undermined the CPE process and the New gTLD Program overall.

⁵⁰ ICANN, Preparing Evaluators for the New gTLD Application Process, 22 November 2011, <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>, Exhibit DIDP A93

⁵¹ ICANN, Quality Program Report for Initial Evaluation Now Available, October 9, 2014, <https://newgtlds.icann.org/en/announcements-and-media/announcement-09oct14-en>, Exhibit DIDP A96

Each member of both the ICANN community and the Music Community will be adversely harmed if the Staff predilection for nondisclosure is maintained and supported by the BGC in its DIDP RR determination. Without an effective policy to ensure openness, transparency and accountability and prevent discrimination, the ICANN's credibility and trustworthiness is at stake. Further, the lack of disclosure negatively affects the BGC in conducting due process, due diligence and making an informed decision in the CPE RR 16-5 to serve the global public interest, raise awareness and adoption of new gTLDs and promote competition.⁵²

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

See Answer to Question 6 above.

8. Detail of Staff/Board Action/Inaction – Required Information

DotMusic, FIM, IFACCA, WIN, Merlin, IMPALA, A2IM, AIM, C3, NSAI and ReverbNation co-filed the CPE RR requesting that the ICANN Board Governance Committee overturns the .MSUIC CPE Report based on CPE process violations and the contravention of established procedures by ICANN and the CPE Panel.^{53 54} According to the CPE RR, some of the ICANN violations of established procedures and policies included:

⁵² DotMusic's application is supported by organizations with members representing over 95% of global music consumed. Industry and community adoption would increase new gTLD awareness substantially and increase competition in the domain space (See http://circleid.com/posts/20161206_how_dot_music_will_go_mainstream_and_benefit_new_gtld_program, DIDP Ex.A116), which are ICANN objectives as per the discussions at the ICANN GDD Summit in Amsterdam (See GDD Industry Summit, May 17 to 19, 2016, <https://www.icann.org/gddsummit>).

⁵³ 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 DotMusic 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>, DIDP Ex.A88; 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

- i. Disregarding International Laws and Conventions with respect to the defined Music Community’s “cohesion” in relation to music copyright;⁵⁵
- ii. Misapplication and disregard of “Community” Definition from 20A;
- iii. Misapplication and disregard of “logical alliance” “Community Definition that has “cohesion” and meets criteria according to the Applicant Guidebook;
- iv. Misapplication and disregard of Community “Name” in Nexus;
- v. Misapplication and disregard of AGB “Majority” Criterion in Support;
- vi. Misapplication and disregard of AGB “Recognized” organizations recognized by both the United Nations (“UN”) and the World Intellectual Property Organization (“WIPO”);⁵⁶
- vii. Disregard of global music federations “mainly” dedicated to Community recognized both by UN and WIPO;
- viii. Misapplication of the AGB’s “Organized” definition in Community Establishment based on false facts and lack of compelling evidence that the Music Community defined is not organized under a regulated sector, and united under principles of international copyright law, international conventions, treaties and agreements;

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://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 therefor 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>, DIDP Ex.A90

⁵⁴ Furthermore, as indicated in the CPE RR and other public media (*See* http://circleid.com/posts/20161206_how_dot_music_will_go_mainstream_and_benefit_new_gtld_program, DIDP Ex.A116) awarding .MUSIC to DotMusic (a community-applicant with support from organizations with members that represent over 95% of global music consumed), will serve the global public interest and substantially increase competition, the global awareness and the adoption of new gTLDs as per the discussions at the ICANN GDD Summit in Amsterdam (*See* GDD Industry Summit, May 17 to 19, 2016, <https://www.icann.org/gddsummit>).

⁵⁵ Also *See* RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>, DIDP Ex.A87

⁵⁶ Also *See* RR-related IFPI Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>, DIDP Ex.A88

- ix. Disregard that the Music Community defined existed before 2007 in Community Establishment;
- x. Policy misapplication and disregard of ICANN-accepted GAC consensus Category 1 Advice in Community Establishment demonstrating the defined Community’s unity under a regulated sector, general principles of international copyright law, international conventions, treaties and agreements;⁵⁷
- xi. Failure to compare and apply consistent scoring across all CPE applications and implement a mandated quality control process to ensure fairness, transparency, predictability and non-discrimination;
- xii. The EIU had a conflict of interest with .MUSIC competing applicant Google. Google’s chairman, Eric Schmidt, was on The Economist Group board during DotMusic’s CPE in violation of the ICANN-EIU Statement of Work (“SOW”) and Expression of Interest (“EOP”), the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles; and
- xiii. EIU’s failure to undertake appropriate (if any) research to support compelling conclusions in the CPE Report, despite DotMusic's (and DotMusic’s supporters’) provision of thousands of pages of “*application materials and...research*” as “*substantive evidence*” of “*cohesion*” under general principles of international copyright law, international conventions, treaties and agreements including DotMusic’s in-depth answers and supporting evidence in response to the EIU’s Clarifying Questions. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions 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.

ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures. The CPE process requires:

Consistency of approach in scoring Applications will be of particular importance...^{58 59}

⁵⁷ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>, DIDP Ex.A89

⁵⁸ CPE Guidelines, p.22, DIDP Ex.A6

⁵⁹ In an email exchange between ICANN and the EIU, there is evidence of a “quality control process” for “consistency of approach in scoring across applications” (in this case the CPE process for .LLP, .LLC and GMBH),

The EIU will fully cooperate with ICANN's quality control process...⁶⁰

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.⁶¹

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."⁶²

The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role...The provider must be able to convene a... panel capable... of evaluating Applications from a wide variety of different communities....The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and... The panel must be able to document the way in which it has done so in each case. ...EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications...All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications."⁶³

The CPE process appeared to have serious conflicts of interest, had no meaningful transparency, and lacked accountability, including verifying that the CPE panel was indeed "*highly qualified*" with "*significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...[music] community plays an important role.*"

ICANN's DIDP Response did provide the names of two of the experts of the CPE Panel: Hillary Steiner (Ewing) and Ben Parisi.⁶⁴ In contravention of the established requirements of the AGB and CPE Guidelines, both panelists were clearly unqualified to evaluate DotMusic's application that relates to the regulated music sector and the music community that is united under general principles of international copyright law and international conventions, agreements and treaties.

During the CPE process, Ben Parisi's position at the EIU was senior project coordinator. According to Ben Parisi's LinkedIn summary, Ben Parisi is a "*campaign organizer, research analyst, and project manager.*" Ben Parisi's previous experience included work as an Arabic translator (for

comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN_DR-00458, p.3, CPE RR 16-5 Ex.A27

⁶⁰ Ibid, pp.22-23

⁶¹ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, DIDP Ex.A82

⁶² Ibid, p.2

⁶³ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22, DIDP Ex.A6

⁶⁴ ICANN DIDP Response, p.14, DIDP Ex.A98

over 8 years), a management associate in the health sector, a director for business development and crowdfunding, an organizer in the child care sector and a steering committee member focused on bringing progressive income tax reform to DC's local tax code, a research analyst with a focus in the Middle East, and a consultant focused on grant proposals, compensation negotiation, writing, editing and translation (for about a one year). Ben Parisi earned a bachelor in philosophy focused on Middle East studies and fellowships relating to “*Egyptian labor history, Arabic literature and Arabic*” as well as “*Arab politics, history, and media.*”⁶⁵

During the CPE process, Hilary Steiner’s position at the EIU was director of public policy, economics and politics in North America. According to Hilary Steiner’s LinkedIn summary, Hilary Steiner is a “*project manager, researcher and people manager with a focus on operational risk and economic analysis,*” having worked at the Economist “*as an economist responsible for economic and political forecasting for selected emerging and developed markets in Asia.*” Hilary Breiner sole publication, the *2014 Nuclear Materials Security Index*, related to the “*use, storage and transport of weapons-usable nuclear materials.*” Hilary Steiner’s experience with the Economist is listed as principal of custom research, product manager in country forecast and editor of the Economist in Asia. Hilary Steiner earned a master’s degree in international political economy and a bachelor degree in political science.⁶⁶

The two CPE panelists’ educational background and expertise in political science and philosophy demonstrates that the panelists lacked the necessary and expected expertise expected for the .MUSIC CPE process. A sophisticated person would reasonably agree that qualified expert for the .MUSIC CPE would be one who has expertise in international music copyright law, the regulated music sector and generally has deep demonstrated knowledge of the functions and activities of the Music Community. The disregard of evidence that the DotMusic application clearly met the CPE criteria (filed by 43 independent expert testimonies and an independent Nielsen Poll in relation to the Community Establishment and Nexus sections) makes it evident that the panelists were not “*highly qualified*” with “*significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined [music] community plays an important role.*”

⁶⁵ Ben Parisi LinkedIn profile, <https://www.linkedin.com/in/benparisi>, DIDP Ex.A100

⁶⁶ Hilary Steiner LinkedIn profile, <https://www.linkedin.com/in/hilary-steiner-9633a91a>, DIDP Ex.A101

DotMusic reminds the BGC that this is not the first time that there was a Reconsideration Request filed concerning panelist qualifications for music-themed New gTLD Program proceedings.⁶⁷

The DIDP Request requested all the names of CPE panelists but only two were provided by ICANN. The Requesters request all the names of the CPE Panel (given that the current panelists that were revealed in the DIDP Response lacked expertise relating to the music community, general principles of international music copyright law and international conventions).

Another aspect of the DIDP Request concerned conflicts of interest relating to Google (a .MUSIC competitor), which has not been an isolated incident for DotMusic throughout the new gTLD Program.^{68 69 70} According to ICANN's Panel Process document,⁷¹ *"the following principles*

⁶⁷ DotMusic informed both the ICC and ICANN that the panelists for the .MUSIC community objections were not qualified because they were not music experts. Both panelists were not replaced. DotMusic filed Reconsideration Requests 13-22 (See <https://icann.org/en/groups/board/governance/reconsideration/13-22/request-dotmusic-23dec13-en.pdf>, DIDP Ex.A112) and 14-8 (See <https://icann.org/en/groups/board/governance/reconsideration/14-8/request-dotmusic-05mar14-en.pdf>, DIDP Ex.A111) but in both instances the BGC rejected the Requests.

⁶⁸ Google is a competing applicant for .MUSIC. In the Community Objections, the .MUSIC and .BAND panelist Sir Robin Jacob selected by the International Chamber of Commerce ("ICC") did not disclose his relationship (or business association) with Samsung, one of Google's most significant business partners. In fact, Google's Android is installed on Samsung's phones, which have a 31% market share globally (See Gardner Research, *Sales of Android Phones to Approach One Billion in 2014*, February 13, 2014, <http://www.gartner.com/newsroom/id/2665715>). Before the community objection determination in favor of Google, on January 27, 2014, *"Samsung Electronics and Google Inc. furthered their long-term cooperative partnership with a global patent cross-license agreement covering a broad range of technologies and business areas. The mutually beneficial agreement covers the two companies' existing patents as well as those filed over the next 10 years."* (See <https://news.samsung.com/global/samsung-and-google-sign-global-patent-license-agreement>, DIDP Ex.A109). Sir Robin Jacob judged a case in favor of Samsung at the expense Apple, of one of Google's biggest competitor (See Judge Sir Robin Jacob, *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339 (18 October 2012), [2012] EWCA Civ 1339, [2013] ECDR 2, [2013] EMLR 10, [2013] FSR 9, [2013] FSR 9, Court of Appeal Division, Civil Case date: 18-Oct-2012, England and Wales at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1339.html>). Following the judgement in favor of Samsung, Sir Robin Jacob was hired by Samsung for a case relating to Ericsson, which appeared to be a conflict of interest (See *Above The Law*, *Conflicts of Interest Are Just Classier With English Accents*, March 1, 2013, <http://abovethelaw.com/2013/03/conflicts-of-interest-are-just-classier-with-english-accents>; *VentureBeat*, U.K. judge who forced Apple to apologize to Samsung hired ... by Samsung, February 28, 2013, <http://venturebeat.com/2013/02/28/uk-judge-who-forced-apple-to-apologize-to-samsung-hired-by-samsung>; and *Foss Patents*, UK judge who issued extreme ruling for Samsung against Apple hired by... Samsung!, February 28, 2013, <http://www.fosspatents.com/2013/02/uk-judge-who-issued-extreme-ruling-for.html>). DotMusic just discovered that Sir Robin Jacob did not disclose his relationship with Samsung nor the case involving Samsung versus Apple in the CV provided to the ICC (See Sir Robin Jacob CV filed with International Chamber of Commerce in Community Objections, DIDP Ex.A108). DotMusic had to investigate on its own to discover that Sir Robin Jacob had this conflict of interest. Such discovery should not be the responsibility of applicants who have relied on ICANN and the International Chamber of Commerce that was selected by ICANN to administrate the proceedings in a fair, independent and neutral manner. Hiding such an indirect business conflict poses serious conflict of interest issues, especially given some clearly false and unsubstantiated statements that Sir Robin Jacob made in his determinations that ruled against music community objectors. Sir Robin Jacob (i) created a false and impossible standing requirement that one organization must represent every community member in the global music community and all of mankind; (ii) created a false and impossible standing that there must be cohesion with consumers; (iii) falsely determined that the American Association of Independent Music ("A2IM") has no

characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.” ICANN’s DIDP Response stated that “ICANN does not have any documents responsive to the request for ‘correspondence between ICANN and Google’s Vice-President (also ex-ICANN chairman and ICANN Strategy Chair) Vinton Cerf to further investigate the appearance of a conflict of interest.”” The Vice-President

association with “music community” even though its members include those representing Adele and Taylor Swift, two of the best-selling artists globally; and (iv) falsely determined that Roussos (associated with DotMusic and the .MUSIC community application) was an applicant for .BAND when a simple search on ICANN’s microsite shows that Roussos is not an applicant for .BAND: “*But A2IM’s membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind (¶26, p.8)... There is no cohesion or relationship between all those concerned with creating performing, recording or “consuming” music of all the different sorts known to mankind (¶27, p.8)... if it there were a “music community,” A2IM can hardly claim to be associated with it (¶30, p.9).* (See .MUSIC Community Objection against Google, CASE No. EXP/462/ICANN/79, February 18, 2014, <https://newgtlds.icann.org/sites/default/files/drsp/24feb14/determination-1-1-1680-18593-en.pdf> ... *Mr Roussos’ application for .band (¶39, p.10)* (See .BAND Community Objection against Donuts, CASE No. EXP/459/ICANN/76, February 18, 2014, <https://newgtlds.icann.org/sites/default/files/drsp/24feb14/determination-1-1-1350-42613-en.pdf>). DotMusic filed a Reconsideration Request 14-8 concerning this conflict of interest and the panelist’s reliance on false facts (See <https://www.icann.org/en/groups/board/governance/reconsideration/14-8/request-dotmusic-05mar14-en.pdf>, DIDP Ex.111) but the BGC rejected the Reconsideration Request.

⁶⁹ Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) for .MUSIC, .SONG and .TUNES (See <https://newgtlds.icann.org/sites/default/files/drsp/16dec13/determination-1-1-1316-18029-en.pdf>, p.5), while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist. LRO panelist Doug Isenberg also rendered a decision for the .FOOD LRO which set LRO precedent on July 24, 2013, which may have affected the unsuccessful DotMusic .MUSIC LRO filed against Doug Isenberg’s client Amazon that was determined by another panelist on August 21, 2013 (See .FOOD LRO with panelist Doug Isenberg at <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1975-66983-en.pdf>, p.12). See Amazon .MUSIC LRO at <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1316-18029-en.pdf>).

⁷⁰ As indicated in the CPE RR, there was also the appearance of a conflict of interest between the Economist and with Google, another .MUSIC applicant. Eric Schmidt, the chairman of Google, was a spokesperson (See <https://www.youtube.com/watch?v=kHSwRHeeCqg>) a trustee and on the board of Economist from November, 2013 (See http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf, p.18 and p.29. Also see The Economist Board retrieved on September 30, 2015:

https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html) to December, 2015 (See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>). DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015 (See <https://newgtlds.icann.org/en/applicants/cpe#invitations>). That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10th, 2016 (the .MUSIC CPE Report release date), there were 22 community applicants that have gone through CPE (See <https://newgtlds.icann.org/en/applicants/cpe#invitations>). Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN’s ex-CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015 (See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12th, 2015, p.61, CPE RR Ex.A30-1), yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.

⁷¹ EIU Panel Process, p.2

of Google (a .MUSIC competitor) was appointed by ICANN during the New gTLD Program's evaluation period to a formal ICANN position to chair and “*support development of ICANN's strategic and operational plans*” and “*to inform a new, overarching vision and five-year strategic plan.*”⁷² While there is no evidence of improper behavior, there is an appearance of a conflict of interest. It is reasonable to agree that ICANN should not be appointing Google executives to highly influential and formal ICANN positions while competing evaluations (such as that of .MUSIC) have not been finalized yet, regardless whether or not the executive holds great experience and knowledge in ICANN affairs and processes (given that the Google executive was a prior ICANN Board chairman who has made significant internet contributions).

In an IRP Final Declaration on May 5, 2016, independent IRP panelist Philip W. Boesch, Jr, raised serious issues of New gTLD Program panelist conflicts of interest and ICANN's lack of accountability, transparency, especially in matters of public importance and interest:

When ICANN receives its extraordinary power and authority, based on the promise of independent judgment, transparency, and accountability, there is no room for whitewashing the egregious failure of disclosure here. The decision-maker was the lawyer for undisclosed clients directly benefited by his ruling (Section A, para.3). ...For the Panel to find that it cannot act except at best in an advisory capacity, and that its neutered role is not a systemic problem, is unsatisfactory and unsatisfying (Section D, para.4)... Every time the Board or its agents or delegated decision-makers consider action or inaction of any kind, in addressing the decision of the Board's delegated decision-maker, the Board is acting with and not without conflict of interest. (Section D, para.5) ... independent judgment, transparency and accountability, as to decision-making that is essentially judicial in nature, regarding matters of extreme public import[ance] and interest, should not be set aside by resort to technical rules of construction contrary both to equity and to applicable principles of law. (Section E, para.1)...it disserves the integrity of the system for an opinion to rely upon whether the delegated decision-maker is an agent of the Board, a staff member reporting to the Board, a Board member, or an 'independent contractor' of the Board. (Section F, para.4)... Similarly, the distinction that is made regarding the DCA case is not only a technical one but one that exalts form over substance. There seems to be very little question that the odor of corruption and impropriety hung over the air of the DCA review; it was the fact that the decision presented a direct and blunt assault on the integrity of the entire process, that led to the DCA conclusion, not the distinctions that might be presented in some state's law between constituents, affiliates, agents, independent contractors, and the like.” (Section G, para.1)... If experts are appointed who are, charitably, unaware of the requirements of disclosure, unaware of the need to avoid the appearance of impropriety, or aware only of some allegedly lesser standard of disclosure, then that is the system's failure. Whether that is an inadequacy in training...whether that result is the failure to intervene in an egregious action...or whether that is the emergence of bias over reason...or all three, the result of this review should be the same. It is not acceptable to the integrity of the process to speculate that the expert's decision 'might have been heart-felt.' (Section G, para.2).⁷³

⁷² ICANN, ICANN Announces Strategy Panel Members, October 14, 2013, <https://www.icann.org/news/announcement-2013-10-14-en>, DIDP Ex. A107

⁷³ Philip W. Boesch, Jr, IRP Panelist, Donuts Inc. v. ICANN (.SPORTS/RUGBY), ICDR Case No. 01-14-0001-6263, May 16, 2016, <https://icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf>, pp.70 to 73, DIDP Ex.A99

As set forth, the CPE Report and .MUSIC CPE process present serious deficiencies and concerns of conflicts of interest that were publicly disclosed to the ICANN Board, the ICANN staff and the EIU before the commencement of CPE.⁷⁴ There are no compelling reasons for confidentiality in disclosing the requested documents because it would serve the global public interest to do so and ensure the integrity of ICANN's deliberative and decision-making process while protecting consumers, the ICANN community and the Music Community. The Requesters also reiterate that the CPE process has invoked the majority of ICANN accountability mechanisms (and ICANN resources) in the last few years. As such, it would serve the public interest to disclose all documents requested to ensure ICANN transparency, accountability, credibility, predictability and non-discrimination.

Another process violation relates to Change Requests. In its DIDP Response with respect to Item 4 on Change Requests, ICANN claims that *“the Change Request Process was created during the application window in order to allow applicants to notify ICANN of changes to application materials, as required by Section 1.2.7 of the Guidebook.”*⁷⁵ However, there is nothing in the AGB that allowed ICANN to create new change request language pertaining to CPE without a formal policy development process. In fact, the *“seven change request determination criteria”* that ICANN states in its DIDP Response are not mentioned in the AGB. The Requesters requested the internal documents and correspondence between ICANN Staff that relates to the new policy development of

⁷⁴ Before the .MUSIC CPE process commenced, DotMusic publicly informed the ICANN Board and the EIU (at ICANN 52 Public Forum) that: *“[DotMusic has] some serious concerns. The chairman of Google, Eric Schmidt, is on the Board of “The Economist.” Google is an applicant for .MUSIC. “The Economist” grades our CPE. This is a serious conflict of interest... [DotMusic] will proceed with CPE but with disclosed prejudice.”* See ICANN 52 Singapore Meeting Public Forum Transcript, February 12, 2015, <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, DIDP Ex.A59; According to the EIU's Statement of Work agreement (the “SOW”) with ICANN, the EIU had the opportunity to decline evaluating DotMusic's application in good faith after DotMusic publicly disclosed and raised the issue that there was a serious conflict of interest. According to the SOW, a mere “prospect” of a conflict of interest sufficed to decline the evaluation yet both ICANN and the EIU allowed the .MUSIC CPE to proceed (See EIU Contract and SOW at <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2]: “Panel Firm shall be entitled to decline any assigned application or applications it considers, in good faith, will raise the prospect of a conflict of interest,” DIDP Ex. A8, Section 4, p.10); Disqualification from a proceeding because of an appearance of a conflict of interest (including cases in which a judge's impartiality might be reasonably questioned) is a globally-recognized requirement in proceedings to ensure fairness, non-discrimination and equal treatment. For example, Title 28 of the U.S. Code § 455 mandates that *“any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”* See <https://gpo.gov/fdsys/pkg/USCODE-2011-title28/pdf/USCODE-2011-title28-partI-chap21-sec455.pdf>, DIDP Ex.61; Also see *Liteky v. United States* (92-6921), 510 U.S. 540 (1994): *“Recusal is required whenever there exists a genuine question concerning a judge's impartiality, and not merely when the question arises from an extrajudicial source.”* (p.552) *“The judge does not have to be subjectively biased or prejudiced, so long as he appears to be so.”* (p.554), DIDP Ex.A62

⁷⁵ DIDP Response, pp.7 to 11, DIDP Ex.A98

the “*seven change request determination criteria*” but ICANN provided publicly available documents instead. The *September 5, 2014, Change Request Advisory* page “*requested all changes to the community definition and registration policies are deferred until after the completion of CPE.*” ICANN agrees that the “*seven criteria were carefully developed*” but this new policy development was conducted by ICANN (i.e. without a formal policy development process) and released on September 5, 2014,⁷⁶ two and a half years after the April 12, 2012 application filing date. The Requesters requested the disclosure of “*all non-public internal documents and internal correspondence between ICANN staff*” that related to the development of the seven criteria and the *September 5, 2014, Change Request Advisory* page.

9. What are you asking ICANN to do now?

The Requesters request ICANN to disclose all the Items requested in the Request based on ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability) and ICANN’s Affirmation of Commitments to serve the global public interest.

Such disclosure will increase transparency and provide the BGC with additional information to assist in overturning the CPE Report as requested by the Requesters in the CPE RR. As outlined in the Reconsideration Request 16-5, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL⁷⁷ leads to the conclusion ICANN contravened the CPE Process and did not employ “*consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.*”⁷⁸

A recent ruling by neutral U.S Federal Court Judge R. Gary Klausner does not instill confidence in ICANN’s processing and management of New gTLD Program, including ICANN’s ability to be accountable, transparent and serve the global public interest:

The evidence suggests that ICANN intended to deny DCA's application based on pretext...As such, the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668. Because the Court finds serious questions regarding the

⁷⁶ See <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>, DIDP Ex. A52

⁷⁷ See CPE Comparisons for .MUSIC, .ECO, .GAY, .HOTEL, .OSAKA, .SPA and .RADIO, DIDP Ex.A60

⁷⁸ EIU Panel Process, p.3

enforceability of the Release due to California Civil Code § 1668, the Court need not address DCA's arguments regarding unconscionability or procurement by fraud.⁷⁹

Donuts also attempted to hold ICANN accountable given the lack of the mandatory CPE quality control process for CPE that harmed their efforts. Donuts requested for CPE re-evaluation because of the “*the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations.*” ICANN responded in a letter that ICANN “*will take into consideration the issues raised by the IRP Panel. However, it is not anticipated that the findings of these reviews would impact the processing of applications from the 2012 application round. Such findings from the New gTLD Program Reviews would be considered in the development of future application rounds.*”⁸⁰ It appears that ICANN is ignoring its own processes and AGB rules by removing itself from any accountability in decisions already made at the expense of both community and non-community applicants, by stating that findings by independent panels will be considered in the development of future rounds.

The Requesters request that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate to “*ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.*” The DIDP Request is, in effect, asking ICANN to honor the commitments it has made to the United States Department of Commerce under the Affirmation of Commitments to make such information public. In light of the absence of a quality control process for CPE, the Requesters request the BGC:

1. To review the ICANN Staff decision to withhold all information requested, to ensure that each and every one of the six Items, documents and information requests was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requesters request that the Items and documents requested are granted;
2. To recognize and instruct Staff that ICANN’s default policy is to release all information requested unless there is a **compelling** reason not to do so and, where such a compelling

⁷⁹ U.S. District Judge R. Gary Klausner, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*, Case No. 16-CV-00862, April 12, 2016, <https://icann.org/en/system/files/files/litigation-dca-icann-motion-prelim-injunction-12apr16-en.pdf>, p.5, DIDP Ex.A83

⁸⁰ ICANN Response Letter to Flip Petillion, May 11, 2016, <https://www.icann.org/en/system/files/correspondence/willett-to-petillion-11may16-en.pdf> DIDP Ex.A103

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested, including providing the requested privileged logs in the case of nondisclosure; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding of information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE RR, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE RR). The Requesters also request to attend the BGC meeting(s) in which the deliberation and determination of this DIDP RR is made. The Requesters are not requesting a hearing or a presentation (which was requested in the CPE RR) but to listen to the BGC's deliberations and be available for any questions the BGC may have.

10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

DotMusic is a community applicant for .MUSIC. The other co-requesters are supporting music organizations of DotMusic's community application for .MUSIC. The justifications under which the Requesters have standing and the right to assert this reconsideration request are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.⁸¹
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;⁸²
- iii) Conflict of Interest Issues;

⁸¹ Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

⁸² JAS established that "*the existence of a visible and well-publicized proactive quality program properly incited all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*" The .MUSIC CPE lacked a "*proactive quality control process*" deficient of the Initial Evaluation "*unified approach,*" which "*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*" ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16, DIDP Ex.A80; Also *see* Exhibit DIDP A93

iv) Failure to Consider Evidence filed; and

v) Violation of ICANN Articles of Incorporation/Bylaws:

1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.⁸³
2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.⁸⁴
3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.⁸⁵
4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.⁸⁶
5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.⁸⁷
6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.⁸⁸
7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.⁸⁹
8. Non-discriminatory treatment: 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.⁹⁰
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.⁹¹

Section 7 of ICANN's Affirmation of Commitments by the United States Department of Commerce requires ICANN:

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.⁹²

Moreover, Section 9 of ICANN's Affirmation of Commitments by the United States Department of Commerce requires ICANN to *further commit* beyond its technical mission:

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

⁸³ ICANN Bylaws, Art. I, § 2.6

⁸⁴ ICANN Bylaws, Art. I, § 2.1

⁸⁵ ICANN Bylaws, Art. I, § 2.7

⁸⁶ ICANN Bylaws, Art. I, § 2.8

⁸⁷ ICANN Bylaws, Art. I, § 2.9

⁸⁸ ICANN Bylaws, Art. I, § 2.10

⁸⁹ ICANN Bylaws, Art. I, § 2.11

⁹⁰ ICANN Bylaws, Art. II, § 3

⁹¹ ICANN Bylaws, Art. III, § 1

⁹² ICANN and U.S Department of Commerce Affirmation of Commitments, <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>, Section 7, DIDP Ex.A47

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.⁹³

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

Yes

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

Do you have any documents you want to provide to ICANN? Yes, see Exhibits

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

Constantinos Roussos
DotMusic Founder

Tina Dam
DotMusic Chief Operating Officer

Jason Schaeffer
DotMusic Legal Counsel

DotMusic Website: <http://music.us>
DotMusic Governance Board: <http://music.us/board>
DotMusic Supporting Organizations: <http://music.us/supporters>

Date: May 30, 2016

⁹³ Ibid, Section 9