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January 16, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: **FTI's Reports**

Dear ICANN Board and Board Accountability Mechanisms Committee members:

We write on behalf of our client, DotMusic Limited ("DotMusic"), regarding FTI Consulting's ("FTI") evaluation and the FTI Report (the "Report").

The Report was clearly designed as a "fig leaf" to protect ICANN and the CPE provider from being accountable for flaws that were endemic to the CPE process. ICANN's Board should conclude that the Report has methodological flaws and is incomplete. ICANN's Board should critically evaluate the Report and not accept its wholesale conclusions. It speaks volumes that the investigation lacks transparency and the identities of the personnel involved are shrouded in mystery.

In late 2016, ICANN announced that it was conducting "an *independent review*" of the CPE Process.[1] During a public forum organized at ICANN's March 2017 meeting in Copenhagen, John Jeffrey, ICANN's General Counsel, confirmed that:

- FTI will be "digging in very deeply" and that there will be "a full look at the community priority evaluation;"[2]

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

[2] John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

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- ICANN instructed FTI "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;"[3] and

- "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."[4]

Despite these assurances, the opposite occurred. FTI did not "dig [] in very deeply" or "try to understand the complex process" of the CPE or conduct a "full look" into it. For nearly a year, ICANN continued to stonewall behind its assertion that it was undertaking a purported "independent review" of the CPE process,[5] while at the same time concealing FTI's true mandate and narrow evaluation methodology from the CPE applicants. It was only on 13 December 2017, *after* FTI completed its investigation of the CPE process (without inviting comments from a single CPE applicant), that ICANN published FTI's evaluation and findings regarding the CPE process.

FTI was tasked to perform a "full look" at the CPE Process as part of its independent review.[6] Its investigative team was required to exercise "diligence, critical analysis and

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[3]   John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://schd.ws/ hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

[4]   John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

[5]   Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.

[6]   John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://schd.ws/ hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

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professional skepticism in discharging professional responsibilities" and to ensure that its conclusions are "supported with evidence that is relevant, reliable and sufficient."[7] The FTI's investigation did not live up to its instructions to perform a comprehensive look that the CPE process; its narrow mandate[8] and evaluation methodology were deliberately designed to protect ICANN. FTI admitted it did not re-evaluate the CPE applications or rely upon the substance of the reference material or even assess the propriety or reasonableness of the research undertaken by the CPE Provider. Fundamentally, it refused to interview the CPE applicants. In fact, the FTI deliberately ignored the information and materials provided by the applicants.

On 18 January 2017, Article 19,[9] a U.K. based human rights organization, and the Council of Europe organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss community objections, the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included Cherine Chalaby, (then an ICANN Board Member and current Chairman of ICANN); Mark

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[7]   Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI "followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE)." Scope 1 Report, p. 3.

[8]   FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit ("EIU"), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook ("AGB") when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU's own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU's determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN's core principles; and (9) ICANN's actions related to the CPE process violated its own Bylaws.

[9]   Article 19 (last visited 10 Jan. 2018), https://www.article19.org/.

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Carvell, GAC Vice-Chair & Co-Chair of the GAC Working Group on Human Rights and International Law, and Chris Disspain, ICANN Board Member.

During the webinar, the Board members admitted that the CPE Provider inconsistently applied the AGB and unfairly treated the community priority applicants. For example, Cherine Chalaby stated:

> 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 recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.[10]

Likewise, Mark Carvell stated that:

> 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

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10   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.

operate fairly. ***That was not happening***. Became as I say an issue of increasing concern for many of us on the GAC.[11]

Therefore, the 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 neutral investigator hired by ICANN to pursue a "*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 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 in all available fora whether within or outside of the United States of America.

Sincerely,

Arif Hyder Ali

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[11]   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 and (emphasis added).