Dechert LLP

1900 K Street, NW
Washington, DC 20006-1110
+1 202 261 3300 Main
+1 202 261 3333 Fax
www.dechert.com

ARIF HYDER ALI

Contact Information Redacted
Contact Information Redacted Direct
Contact Information Redacted Fax

December 15, 2016

VIA E-MAIL

ICANN Board Governance Committee (BGC)
c/o Chris Disspain, ICANN BGC Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17

Dear Chairman Disspain and members of the BGC:

We are writing on behalf of our client, DotMusic Limited ("DotMusic"), to request that the Board Governance Committee (the "BGC") consider during its review of DotMusic's Reconsideration Request 16-5 the Council of Europe's recently published report, authored by Eve Salomon and Kinanya Pijl, entitled, "Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (the "CoE Report").[1] The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union).[2] The Council of Europe also has observer status within ICANN's Governmental Advisory Committee ("GAC").

The CoE Report provides additional support for the BGC to accept DotMusic's Reconsideration Request 16-5 and approve DotMusic's application for .MUSIC. Given the

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

[2] *See* Council of Europe, Home Page, http://www.coe.int/en/.

Council of Europe's global nature and remit and its participation in the GAC, we submit that the BGC must seriously consider the report's findings in relation to .MUSIC.

The CoE Report Corroborates DotMusic's Reconsideration Request 16-5

The CoE Report identifies many of the same issues raised by DotMusic in Reconsideration Request 16-5 with respect to the community priority evaluation ("CPE") of DotMusic's application. It confirms that the CPE process was severely undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN's Bylaws and Articles of Incorporation. Furthermore, it addresses the specific ways in which these failings harmed DotMusic. The following excerpts from the CoE Report speak for themselves on these issues:

ICANN's Current CPE Process Contains Substantial Flaws

- "During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination."[3]

- "[W]e have found that priority is given to some groups and not to others, with no coherent definition of 'community' applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority."[4]

ICANN and the EIU Treated DotMusic Differently Than Successful Community Applicants

- "***First***, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to

[3] *Id.*, p. 9.
[4] *Id.*, p. 16.

avoid any 'double-counting' – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the ***EIU appears to double count 'awareness and recognition of the community amongst its members' twice***: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension." [5]

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

  1A: However, according to the AGB, 'community' implies 'more of cohesion than a mere commonality of interest' and there should be 'an awareness and recognition of a community among its members.' The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls 'cohesion' – that is, that the various members of the community as defined by the application are 'united or form a whole' (Oxford Dictionaries).

  IB: However, as previously noted, the community as defined in the application does not show evidence of 'cohesion' among its members, as required by the AGB.

  Although both 1A and 1B are part of the same criterion, the ***EIU has deducted points twice for the same reason***." [6]

- "It is also interesting to note that the ***EIU Panel has not considered this question of 'cohesion' at all in the CPE for .RADIO, where the term does not appear***."[7]

- "***Second***, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE

[5] *Id.*, p. 49 (emphasis added).
[6] *Id.*, p. 49 (emphasis added).
[7] *Id.*, p. 49 (emphasis added).

processes, and some applicants were therefore subject to a higher threshold than others."[8]

- "The EIU has demonstrated inconsistency in the way it interprets 'Support' under Criterion 4 of the CPE process. ***Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community*** . . . . ***By contrast, both .GAY and .MUSIC only scored 1 point***. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one."[9]

- "It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: 'Recognized' means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.' If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as 'recognised' organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not 'recognised'. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community."[10]

- "***Third***, ***the EIU changed its own process as it went along. This was confirmed to us by ICANN staff*** who said that the panels did work to

[8] *Id.*, p. 49 (emphasis added).
[9] *Id.*, p. 51 (emphasis added).
[10] *Id.*, p. 57.

improve their process over time, but that this did not affect the process as described in the AGB."[11]

- ***Fourth***, "[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. . . . A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law)."[12]

Improper Conflicts of Interest Existed During DotMusic's CPE Process and Exist in the Overall CPE Process

- "It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that ***Sir Robin Jacob*** (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist."[13]

- "It was pointed out to us that ***Eric Schmidt*** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google's former CEO). Google is in

[11] *Id*., p. 51 (emphasis added).
[12] *Id*., p. 52.
[13] *Id*., p. 41 (emphasis added).

contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of ***Vint Cerf*** who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."[14]

- "On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts."[15]

There is an Improper Lack of Transparency in ICANN's CPE Process

- "The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, 'We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.' However, in

[14] *Id*., p. 47 (emphasis added).
[15] *Id*.

all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation."[16]

- "It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN)."[17]

As seen by these excerpts, the CoE Report confirms that the CPE process was rife with issues of inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic's application. This is contrary to ICANN's own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, Jan Kleijssen, the Council of Europe's Director of Information Society and Action against Crime, reiterates ICANN's commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

> The ICANN Board's commitment to a new bylaw on human rights recognises that the Internet's infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the ***public interest*** . . . [P]articular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.[18]

The failure of the EIU and ICANN staff to adhere to ICANN's commitments when conducting CPEs further demonstrates how the process directly violated ICANN's Bylaws and Articles of Incorporation. The CoE report therefore affirms DotMusic's assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC.

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[16] *Id*., p. 53.
[17] *Id*., p. 54.
[18] *Id*., p. 3 (emphasis added).

DotMusic's Application Represents a Bona Fide Community and Serves the Public Interest

Additionally, DotMusic satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

> It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.[19]

The answer to each of those questions is "yes" with respect to DotMusic's community-based application. DotMusic represents an authentic, bona fide global music community supported by organizations with members representing over 95% of the consumed global music.[20] DotMusic's Registration Policies[21] also ensure that it is accountable to the music community.

The CoE Report also outlines the importance of trust, protecting vulnerable communities (such as the music community and music consumers), and enhancing safeguards for strings linked to a regulated sector (such as .MUSIC) in order to serve the public interest:

> It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to

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

[20] *See* .Music (DotMusic Limited), .Music Community Supporting Organizations, http://www.music.us/supporters; DotMusic Limited, Application Attachment 20f (Support Letters), https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadattachment/142588?t:ac=1392.

[21] DotMusic scored maximum points in CPE under the Registration Policies section.

> national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – ***serve the public interest***.[22]

According to the "Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,"[23] in pursuing its *commitment to act in the general public interest*, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

DotMusic is Committed to Facilitating Freedom of Expression for All Parties that Seek to Use the .MUSIC Community TLD

The CoE Report also discusses .MUSIC in relation to the right to freedom of expression. The report explains how .MUSIC will enforce "legitimate" safeguards to protect the music community's intellectual property rights and consumers against crime, thus facilitating the music community's freedom of expression:

> DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal,

[22] *Id.*, p. 35 (emphasis added).
[23] Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true,

> licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.[24]

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

> As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.[25]

In accordance with serving the global public interest, DotMusic does not "undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names."[26] DotMusic's Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain "to express and seek opinions and ideas" in relation to music or to exclude any registrant who is part of the music community:

> 3. A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .
>
> 5. A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents

[24] *Id.*, p. 20.
[25] *Id.*, pp. 19-20 (emphasis added).
[26] *Id.*, p. 20.

> represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.[27]

The CoE Report affirms that DotMusic will promote the right to freedom of expression through the .MUSIC TLD. It explains that DotMusic "intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies."[28] It also reiterates the consensus that the objective of community-based applications is to *serve the public interest* and *protect vulnerable groups* (such as the music community) and *consumers from harm* (such as from malicious abuse):

> There is consensus that community-based applications ought to serve the public interest, but without agreement about what "public interest" might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.[29]

DotMusic's community-based application will protect the music community and the global public interest from harm. Therefore, we urge the BGC to seriously consider the CoE Report when evaluating DotMusic's Reconsideration Request 16-5, particularly with respect to the discussion of DotMusic's promotion of human rights and the general public interest through .MUSIC and the problems it identified with the CPE Process.

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[27] DotMusic Limited, Specification 11 Public Interest Commitments ("PIC"), pp. 1-2, https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392.

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

[29] *Id.*, p. 8.

The BGC Must Accept DotMusic's Reconsideration Request 16-5 and Award DotMusic Community Priority for .MUSIC

For these reasons and those already presented by DotMusic and its co-requesters,[30] DotMusic submits that the BGC must accept Reconsideration Request 16-5. Doing so is supported by the record and in the best interest of the public and the Internet community. Awarding DotMusic the right to operate the registry for .MUSIC would ensure that it is a safe, secure, and trusted gTLD that serves the global public interest and protects the global music community and Internet users.

Finally, we urge the BGC to take the additional step of awarding DotMusic community priority or, alternatively, recommending to the Board that it award DotMusic community priority for .MUSIC. The BGC and the Board are authorized to make this determination pursuant to the ICANN Bylaws and Module 5.1 of the Guidebook.[31]

Sincerely,

Arif Hyder Ali
Partner

cc: John Jeffrey, General Counsel & Secretary, ICANN
Amy Stathos, Deputy General Counsel, ICANN

[30] DotMusic's co-requestors are the following: International Federation of Musicians, International Federation of Arts Councils and Culture Agencies, Worldwide Independent Network, Merlin Network, Independent Music Companies Association, American Association of Independent Music, Association of Independent Music, Content Creators Coalition, Nashville Songwriters Association International, and ReverbNation.

[31] *See* ICANN Bylaws, Art. 2, § 1 (Feb. 11, 2016); gTLD Applicant Guidebook, Module 5.1 (June 4, 2012) ("ICANN's Board has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of ***the use of an ICANN accountability mechanism***.") (emphasis added).