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## **DotMusic Comments on the Initial Draft Proposal by the Cross Community Working Group (CCWG) on Enhancing ICANN Accountability**

DotMusic supports the creation of a meaningful framework that would hold both the ICANN Board and ICANN Staff accountable to serve the global public interest and to enhance trust. DotMusic commends the CCWG for its efforts in submitting the initial draft proposal to the community for review. Overall, DotMusic is supportive of the accountability framework proposed by the CCWG. It is essential that an appropriate and meaningful accountability framework be in place before the IANA Functions contract expires.

DotMusic has been harmed numerous times as a result of inconsistent and unpredictable determinations that have been a common theme throughout the New gTLD Program with respect to Legal Rights Objections, Community Objections and other New gTLD Program-related Determinations (e.g. A Request for Re-consideration filed by a competitor against DotMusic's Public Interest Commitments<sup>1</sup>). In all these cases, there was no appeal mechanism in place to hold the Panel or the ICANN BGC accountable for their Determinations. Moreover, DotMusic reiterates its concern about the anonymous nature of the panels determining the results of the Community Priority Process (CPE). Such a lack of transparency harms community applicants, favors non-community applicants and harms ICANN's accountability. Keeping the CPE panelists identity a secret and not allowing community applicants to communicate with CPE panelists also undermines transparency and further harms ICANN's accountability.

The current ICANN accountability framework is inadequate. Furthermore, any ICANN accountability framework that will be implemented requires mechanisms for enforcement to be effective.

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<sup>1</sup> In this case, the competing applicant's obstructive filing (See .Music LLC Reconsideration Request 15-6, <https://www.icann.org/en/system/files/files/reconsideration-request-15-6-music-redacted-17apr15-en.pdf>) has resulted in delays in DotMusic's Community Priority Evaluation invitation and the inclusion of a disclaimer pertaining to DotMusic's PIC clarification section (See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>). While the disclaimer states that the clarifications will not be part of DotMusic's Registry Agreement, DotMusic commits that the copyright provisions contained in the clarification section will be incorporated in its Registry Agreement.



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## Revised Mission, Commitments & Core Values

DotMusic agrees with the recommended changes to ICANN’s Mission, Commitments, and Core Values. These changes will help create a culture of accountability within ICANN. However, DotMusic is concerned that a Bylaws statement that “ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet’s unique identifiers or the content that they carry or provide” can be interpreted too broadly. DotMusic recommends that this broad proposed language be reviewed and refined to reduce the risk of any interpretation that would constrain ICANN’s ability to enforce any contractual obligation.

## Independent Review Panel (IRP) Enhancement

DotMusic agrees with the “Declaration on the IRP Procedure” issued by the Panel in *DCA Trust v. ICANN*<sup>2</sup> that the process should be deemed “binding” upon the Board and should not be merely “advisory.” We also agree with the CCWG’s recommendation that IRP decisions be “precedential” and consistent with appropriate “weight” given to prior decisions.

Furthermore, the statement that additional exclusion of items “so material to the Board that it would undermine its statutory obligations and fiduciary roles” is too vague and requires additional clarification.

DotMusic believes that “training on the workings and management of the domain name system” is meaningful, especially in light of the inconsistent New gTLD Program’s Community Objection process that has harmed DotMusic materially as well as other community members. As such, with respect to panel appointments, it is critical that candidates be selected based on their expertise on the related subject-matter, excluding those with merely peripheral expertise. Allowing for panel expertise to be enhanced as deemed appropriate by qualified experts with specialized knowledge in the subject-matter is a practical and meaningful measure.

With respect to decision-making, IRP panels should be permitted to “undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts”<sup>3</sup> consistent with the IRP decision *Booking.com v. ICANN*:

“Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN

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<sup>2</sup> See <https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf>

<sup>3</sup> See ¶ 133, 17b



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in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”<sup>4</sup>

Furthermore, ICANN should consider the incorporating appropriate controls in the Cooperative Engagement Process (CEP) and IRP to prevent anti-competitive behavior by certain actors. For example, in the New gTLD Program both the CEP and IRP processes have been used extensively as an anti-competitive tool by a few gTLD applicants if they failed to prevail in their contention set.

### **Reconsideration Process Enhancement**

DotMusic supports many of the CCWG’s recommendations to improve the Request for Reconsideration (“RfR”) process, especially in areas concerning improving transparency mechanisms, document disclosure policies, and an opportunity for rebuttal prior to the Board’s final determination. It is recommended that ICANN also considers incorporating an Initial review with the Ombudsman, who can serve a facilitative role in the process and help increase efficiency. DotMusic also supports the CCWG’s efforts to broaden the RfR standards and applicability to change “material” to “relevant” as well as removing highly subjective dismissal criteria such as “vexatious” or “querulous.” It is noteworthy to indicate that only two RfR’s have ever actually been accepted by the BGC (ICANN Board Governance Committee), which may be a result of a conflict of interest. This is because the ICANN BGC has an inherent bias in favor of ICANN Staff since both the BGC and Staff serve ICANN’s best interests. An independent body without any relation to ICANN might be better suited to take this role of deciding RfR’s.

### **Mechanism to Empower the Community**

DotMusic agrees with the proposal for ICANN to introduce a community mechanism to empower the community over certain Board decisions because it would enhance ICANN’s accountability. DotMusic also recommends that ICANN consider additional accountability reforms that would consider how the community can have oversight over ICANN Staff decisions. Furthermore, ICANN must incorporate an external, independent process for

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<sup>4</sup> See <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, P.32-33, ¶ 111



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reviewing and resolving disputes between ICANN and third-parties. Such a process should include the ability to reverse ICANN Board decisions.

### **Power to Approve Changes to "Fundamental" Bylaws**

DotMusic agrees that empowering the community to approve any change to a Fundamental Bylaw will enhance ICANN's accountability to the community. However, more clarity is required on how the community will be empowered to do so.

### **Power to Recall Individual ICANN Directors and Entire Board**

DotMusic agrees that the community should have the power to remove Board members or the entire Board. A special committee may be considered to handle these petitions for any Board member removal.

### **Incorporating the Affirmation of Commitments into the ICANN Bylaws**

DotMusic supports having key commitments from the Affirmation of Commitments incorporated in the ICANN Bylaws according to CCWG proposal.

### **Conclusion**

DotMusic concludes that the Initial Draft Proposal by the CCWG constitutes a significant first step towards increasing ICANN's accountability and commends the CCWG for their work.

Respectfully Submitted,

Constantine Roussos  
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