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May 21, 2016

Re: Public Comments related to Draft New ICANN Bylaws

Dear ICANN,

DotMusic appreciates the opportunity to comment on the draft of ICANN's new proposed Bylaws (*See <https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>*). DotMusic would like to thank the team drafting the new Bylaws, including the CCWG, the CWG, ICANN's legal staff and all of those involved in this highly complex and important task in formulating ICANN's new Bylaws before the proposed IANA transition.

However, it is DotMusic's opinion that the draft new ICANN Bylaws require more attention and revisions to create the most effective ICANN Bylaws reform to hold ICANN accountable and to increase ICANN's transparency. While commendable and significant work has been made, it appears that these draft new ICANN Bylaws are being hurried to be accepted by the Board to accommodate the timing of the proposed IANA transition. The draft new ICANN Bylaws have many issues that require urgent attention, including more revisions to strengthen controls to hold ICANN accountable and increase ICANN's transparency. DotMusic respectfully urges ICANN to allow more time so that the new ICANN Bylaws are done right and are not hurried solely to meet a deadline at the expense of creating new Bylaws that do not make a difference that matters. DotMusic requests that the draft new ICANN Bylaws are delayed slightly to assemble further feedback and to truly fine-tune the new Bylaws. DotMusic is aware that many within the ICANN community may be eager in finalizing the new Bylaws, which, in DotMusic's view, still provide ICANN with lots of leeway to remain unaccountable and continue to lack transparency.

Further, it is of great significance to remember that the revisions of the new Bylaws must only address functional changes that relate to ICANN. Any attempts by ICANN to use the new Bylaws as an opportunity to continue shielding itself from any liability and responsibility for its actions (or inactions) compromises true accountability and transparency and is against the global public interest.

In addition, ICANN's Bylaws state that ICANN should be accountable to "the Internet community." But there is no such coherent or cohesive community that is unified under a common ideal (such as in the case of the music community that is united in protecting music copyright under international law and international conventions). The ICANN community is diverse, made up of different public and private groups, with many different and often contradictory interests. While ICANN presents itself as only a body that performs technical functions, these technical functions and responsibilities do have enormous public policy and global public interest implications.

The biggest risk with an independent ICANN is less about being influenced by authoritarian states and more about being influenced by private and special interests that have vested interests and a strong stake in the New gTLD Program and ICANN's decision-making. Such independence could implicate ICANN in anti-trust litigation if ICANN continues to favor of a few special interests and continue to go against



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its mandate to promote true competition and increase diversity in the domain namespace, including serving underserved communities, trustworthy communities and constituent groups. One of the goals of the New gTLD Program was to accommodate these communities that but has failed to do so in favor of a few special interests and in favor of those with deep pockets. It is noted that the majority of accountability mechanisms filed against ICANN during the New gTLD Program were in relation to some sort of “community” interest.

As history has shown, the effectiveness of the arbitral process (that was successful in the ICM .XXX case) pushed ICANN to strip the IRP process of any value (after ICANN’s IRP loss to the ICM) to limit ICANN’s responsibility, accountability and transparency.

DotMusic’s recommendations aim to increase ICANN’s accountability, transparency and responsibility to serve the global public interest and Internet users. DotMusic’s objective with its suggestions was to remove any language that is unclear, ambiguous and would create loopholes that would compromise transparency and accountability and be against the global public interest.

As such, DotMusic supports the following:

1. Creation of a reasonable timeframe in which to complete the Cooperative Engagement Process (“CEP”) to prevent competing applicants from using CEP as a mechanism to cause undue delay to other applicants in future New gTLD rounds;
2. To the maximum extent possible, the ICANN Board must publish the full transcriptions of all Board and Committee meetings and provide written justification for documentation which is not published solely for the most narrowly construed reasons of privilege, as qualified under the law, or subject to confidentiality restrictions contained in contract;
3. Require ICANN to define “internet community” (is the “community” contracted parties, stakeholder groups, or is it all billions of Internet users?);
4. That all ICANN third-party contractors are required to comply and be bound by ICANN’s Articles of Incorporation and Bylaws, as implied in the current Bylaws in force;
5. Incorporate controls to ensure that the Ombudsman is independent, conflict-free and non-biased in their decision-making;
6. That the ICANN Board must take action in any request that is petitioned by multiple organizations that relate to a community that is associated to specific string;
7. That ICANN allow for IRP Declarations to be binding upon ICANN and appealable to a court of competent jurisdiction; and
8. The current IRP process and that it should remain under ICDR rules, with abolishment of ICANN’s Supplemental Rules, so that the community has a fair opportunity to have their issue(s) heard before an independent neutral third party.

Further, DotMusic is opposed to the following:

1. A Standing Panel for the IRP: All such additional language should be stricken related to a “Standing Panel” because of the appearance of conflicts of interest with ICANN, especially



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since an ICANN-run process that lacks true independence will be selecting the Standing Panel and will be deciding whether or not to renew specific members of the Standing Panel. This incentivizes Standing Panel members to rule in ICANN's favor because their reappointment depends on it. Further ICANN is responsible for the Standing Panel's compensation, which is a conflict of interest. The IRP process should be run independently and strictly under ICDR rules, which includes the right to appeal an IRP final declaration;

2. A mandatory Ombudsman's Review of Reconsideration Requests: The Ombudsman is reappointed (*See <https://features.icann.org/reappointment-ombudsman>*) and compensated by the ICANN Board and can be terminated at will by the ICANN Board. Further, the Ombudsman's at-risk compensation is determined by the Board (*See <https://features.icann.org/ombudsman-fy15-risk-compensation>*). As such, the Ombudsman's judgment is not entirely "independent" of the Board and an appearance of a conflict of interest exists;
3. The Board retaining sole authority and review of the Ombudsman's contract and performance without Community input to ensure the Ombudsman is acting in the best interest of the Community as well as ICANN. The community must be able to provide input and hold the Ombudsman accountable for their performance;
4. All language contained in the proposed Bylaws which is implied, illusory, subjective or is ambiguous to interpretation of Board action (such as the repetitive use of the words "may," "could," "reasonably," etc.). These words must be replaced with definitive requirements language such as "will," "shall," "must," and "required." In almost all IRP's, ICANN's main defense is "show me where the Board is required act," which incentivizes the Board to do nothing in any affair;
5. ICANN hiding and concealing activity under the pretext of overly-broad confidentiality provisions contained in agreements with third-party contractors;
6. ICANN continued refusal of requestor action(s) to bring "substantive" reviews of material information or decisions under ICANN's Accountability Mechanisms;
7. ICANN's insistence on trying to include additional liability protections under the California Business Judgment Rule, which should not apply to ICANN (*See ICM IRP Declaration for .XXX*); and
8. ICANN not requiring conflict of interest certifications and verifications on all vendors, agents, experts and third-party contractors to ensure the stakeholder community and contracted parties (i.e., registries and registrars) that no conflicts, either perceived or actual, exist. ICANN must ensure that even the appearance of conflict is eliminated.



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Recommended Edits

Green color denotes suggested edits

Red color denotes deletion

Section 1.1 Mission

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System (“DNS”) and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies: • For which uniform or coordinated resolution is **reasonably** necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2;...

...(c) ICANN shall not regulate **(i.e., impose rules and restrictions on)** services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). **For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority, and nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations.**

...4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation (“Articles of Incorporation”): **(A)(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on, or undergoing negotiation as of, [1 October 2016];1, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement; (2) any registry agreement or registrar accreditation agreement not encompassed by (1) above that is based on substantially the same underlying form of registry agreement or registrar accreditation agreement that existed on [1 October 2016];...**

... **(F) any renewals of agreements described in subsections (A)–(D) pursuant to their terms and conditions for renewal.**

Section 1.2 Commitments and Core Values

(a) (iii) Respect the creativity, innovation, and flow of information made possible by the Internet **by limiting ICANN’s activities to matters that are within ICANN’s Mission and require or significantly benefit from global coordination;**



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- (iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on **independent** expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- (v) Make decisions by applying documented policies consistently, **transparently, non-discriminatorily**, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and
- (vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws **and Articles of Incorporation** ~~that to~~ enhance ICANN's effectiveness.

(b) CORE VALUES

... (v) **To the maximum extent possible**, operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws **and Articles of Incorporation**, at a speed that is responsive to the needs of the global Internet community;

... (viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. ~~This Core Value does not create and shall not be interpreted to create any additional obligations for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN, except as provided herein.~~

Section 2.3 Non-Discriminatory Treatment

ICANN, **including its Board, staff, agents, and contracted third parties, will** ~~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.

Section 3.1 Open and Transparent

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, including, **but not limited to**, implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b)



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maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also transcribe each Board meeting and make available on its website all types of transcriptions, and implement procedures for the documentation and public disclosure of rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).

Section 3.2 Website

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the “Website”), which may will include, among other things, (a) a calendar of scheduled meetings of the Board, the EC, Supporting Organizations, and Advisory Committees; (b) a docket of all pending policy development matters, including their schedule and current status; (c) specific meeting notices, meeting transcriptions, and agendas as described below; (d) information on the ICANN Budget, annual audit, financial contributors and the amount of their contributions, and related matters; (e) information about the availability of accountability mechanisms, including the cooperative engagement process, reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (f) announcements about ICANN activities of interest to significant segments of the ICANN community; (g) comments received from the community on policies being developed and other matters; (h) information about ICANN’s physical meetings and public forums; and (i) registry and registrar contracts; and (j) other information of interest to the ICANN community.

Section 3.5 Minutes and Preliminary Reports

... (b) No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN’s principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters, which qualify privileged, as defined by law, or subject to confidentiality restrictions contained in contract (~~to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN~~), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available.

(c) No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN’s principal office), the complete transcription of the Board meeting (absent 3.5(b) exemptions above) and any actions taken



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by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 3.5(b) above. For any matters that the Board determines not to disclose, the Board shall describe ~~in general terms~~ in the relevant preliminary report the reason for such nondisclosure.

(d) No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes of the Board shall be made publicly available on the Website; provided, however, that any minutes of the Board relating to personnel or employment matters, legal matters, which qualify for attorney-client privilege as defined by law, ~~(to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN)~~, matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe ~~in general terms~~ in the relevant minutes the reason for such nondisclosure.

Section 3.7 Translation of Documents

As appropriate and to the extent provided in the ICANN Budget, ICANN shall facilitate the translation of final published documents ~~into various appropriate languages~~.

Section 4.1 Purpose

In carrying out its Mission to the maximum extent possible, ICANN shall be transparent and accountable to the community (ICANN must define the “community” in an organized and delineated manner as mentioned earlier) for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes ~~for Covered ICANN Actions~~ and procedures for periodic review of ICANN’s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.2 Reconsideration

(a) ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request (“Requestor”) the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, “Staff” includes employees and ~~third party individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly~~.



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...(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Bylaws or Articles of Incorporation ~~Mission, Commitments, Core Values and/or established ICANN policy(ies)~~;
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate ~~relevant~~ information.

... (e) The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct ~~whatever~~ factual investigations ~~is deemed appropriate~~;

... (g) (i) (C) for requests challenging either Board or Staff inaction, the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action ~~would was not be taken in a timely manner~~.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing, consistent with the Bylaws.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits.

...(k) The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if:



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(i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

~~(i) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.~~

~~(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.~~

~~(ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.~~

~~(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.~~

... (n) The Board Governance Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard in person, via video or teleconference.

... (q) The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days ~~following its receipt of the Ombudsman's evaluation (or 30 days following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or the receipt of the Community Reconsideration Request, if applicable), unless impractical~~, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. The Board Governance Committee shall take action in any request that is petitioned by multiple organizations that relate to a community that is associated to specific string.

The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the Board Governance Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the Board Governance Committee's



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final recommendation; and (ii) ~~not offer evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.~~

(r) The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its **independent** rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. ...

....(i) relates to confidential personnel matters, (ii) ~~is covered by qualifies as~~ attorney-client privilege, work product doctrine or other recognized legal privilege, **as defined by law** (iii) is subject to a legal obligation that ICANN maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN's redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN's principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration ~~and must demonstrate a likelihood of success with the Reconsideration Request.~~

... (iv) whether or not, ~~in the Board Governance Committee's view,~~ the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3 Independent Review of Covered ICANN Actions

(a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii), below) alleged by a Claimant to be within the scope of the Independent Review Process ("IRP"). The IRP is intended to hear and resolve Disputes for the following purposes ("Purposes of the IRP"):



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- (i) Ensure that ICANN does not exceed the scope of its ~~limited technical~~ Mission and ~~otherwise~~ complies with its Articles of Incorporation and Bylaws.
 - (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable, accessible expert review of Covered Actions.
 - (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
 - (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract.
 - (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI service complaints that are not resolved through mediation.
 - (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers, Staff members, Supporting Organizations, Advisory Committees, **third party contractors**, and the global Internet community in connection with policy development and implementation.
 - (vii) Secure the accessible, transparent, efficient, consistent, coherent, **unbiased**, **nondiscriminatory**, and just resolution of Disputes.
 - (viii) Lead to binding, final resolutions consistent with international **principles of arbitration** **and international principles of law norms** that are enforceable in any court with proper jurisdiction.
 - (ix) Provide a mechanism for the resolution of Disputes, as an **initial** alternative to legal action in the civil courts of the United States or other jurisdictions.
- ... (B) (ii) “Covered Actions” are defined as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, **agents, contracted third parties** or Staff members that give rise to a Dispute.
- ... (e) Cooperative Engagement Process (i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (“CEP”) for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time. (ii) The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant **or ICANN** does not participate in good faith in the CEP, **in the timeframe allotted**, and **ICANN** the participating party is the prevailing party in the IRP, the IRP Panel shall award to **ICANN** the participating party all reasonable fees



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and costs incurred ~~by ICANN~~ in the IRP, including legal fees.

...~~(g)~~ Upon the filing of a Claim, an Independent Review Process Panel (“IRP Panel”, described in Section 4.3(k) below) shall be selected in accordance with the Rules of Procedure. Following the selection of an IRP Panel, that Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN’s written response (“Response”) in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions ~~decided under the same version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law~~. If no Response is filed by ICANN, the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

~~(h) (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of relevant principles of arbitration, relevant principles of international law, other ~~the norms of~~ applicable law and prior relevant IRP decisions. (iii) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.~~

~~...(j) Standing Panel~~

~~(i) There shall be an omnibus standing panel of at least seven members (the “Standing Panel”) each of whom shall possess significant relevant legal expertise in one or more of the following areas:~~

~~international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN’s Mission, work, policies, practices, and procedures.~~

~~Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet’s unique identifiers and be required to comply with ICANN’s conflict of interest policies; (ii) ICANN shall, in consultation with the Supporting Organizations and Advisory Committees, initiate a four step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP. (A)ICANN, in consultation with the Supporting Organizations and Advisory Committees, shall initiate a tender process for an organization to provide administrative support for the IRP (“IRP Provider,” described in Section 4.3(m)), beginning by consulting the “IRP Implementation Oversight Team” (described in Section 4.3(n)(i)) on a draft tender document. (B)ICANN shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations and Advisory Committees and the Board to identify and solicit applications from well qualified candidates, and to conduct an initial review and vetting of applications.~~

~~(C)The Supporting Organizations and Advisory Committees shall nominate a slate of proposed panel members from the well qualified candidates identified per the process set~~



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~~forth in Section 4.3(j)(ii)(B).~~

~~(D) Final selection shall be subject to Board confirmation.~~

~~(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.~~

~~(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region.~~

(k) IRP Panel

(i) A three-member IRP Panel shall be selected ~~from the Standing Panel~~ to hear a specific Dispute.

(ii) The Claimant and ICANN shall each select one panelist ~~from the Standing Panel~~, and the two panelists selected by the parties will select the third panelist, ~~as Chair from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.~~

(iii) Assignment ~~from the Standing Panel~~ to IRP Panels shall take into consideration ~~the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.~~

... (n) Rules of Procedure

(i) ~~An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") that conform international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.~~

(ii) The IRP Rules of Procedures shall be informed by relevant principles of international arbitration, and relevant principles of International law ~~international arbitration norms~~ and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the



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IANA naming functions and are not resolved through mediation. The Rules of Procedure shall take effect upon approval by the Board, such approval shall not to be unreasonably withheld.

~~(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment.~~

... (o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws;
- (iv) ~~Recommend~~ Require that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;
- (vi) Determine the timing for each IRP proceeding, and
- (vii) Determine ~~the shifting award~~ of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the status quo. ~~A single member of the Standing Panel (“Emergency Panelist”) shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider’s rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all at least one of the following factors:~~

- ~~(i) A harm for which there will be no adequate remedy in the absence of such relief; or~~
- ~~(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and or~~
- ~~(iii) A balance of hardships tipping decidedly toward the party seeking relief.~~

(q) Conflicts of Interest

(i) ~~Standing IRP~~ Panel members must be independent of ICANN and its Supporting Organizations and Advisory Committees, and so must adhere to the following criteria:

(A) Upon consideration for the ~~Standing IRP~~ Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN, a



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Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN positions.

(ii) The IRP Provider shall disclose any material relationship with ICANN, and ICANN contracted third party relevant to the proceeding, a Supporting Organization, an Advisory Committee, or any other participant relevant to the in-an IRP proceeding.

(r) ~~ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members.~~ Each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

...(t) Each IRP Panel shall make its decision based solely on the evidence, which shall include documentation, supporting materials, witness statements, expert reports, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

(u) All IRP Panel proceedings shall be conducted on the record, and documents filed in connection with IRP Panel proceedings shall be posted on the Website, except for settlement negotiation or other proceedings specifically under non-disclosure agreement that could materially and unduly harm participants if conducted publicly. ...

(v) Subject to this Section 4.3, all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, ~~as understood in light of prior IRP Decisions decided under the same version of the provision of the Articles of Incorporation and Bylaws at issue, and norms as well as relevant principles of International arbitration and relevant principles of International law.~~

...(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions ~~and decisions of an en-banc Standing Panel upon an appeal~~ are intended to be enforceable in any court with jurisdiction over ICANN without a de novo



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review of the decision of the IRP Panel ~~or en banc Standing Panel~~, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions ~~of Disputes of Covered Actions~~ as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, ~~or en banc Standing Panel~~, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision ~~without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal~~, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action. ...

Section 4.4 Periodic Review of ICANN Structure and Operations

(a) The Board shall cause a ~~periodic annual~~ review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization, council or committee has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether that organization, council or committee is accountable to its constituencies, stakeholder groups, organizations and other stakeholders. ~~These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group....~~

Section 5.1 Office of Ombudsman

(a) ICANN shall maintain an Office of Ombudsman ("Office of Ombudsman"), to be managed by an ombudsman ("Ombudsman") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.



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- (b) The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board after 30 day posting for public comments to ensure that the renewal of the Ombudsman's contract is consistent with stakeholder community and Board expectations.
- (c) The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.
- (d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN Budget recommended by the ICANN President to the Board. Nothing in this Section 5.1 shall prevent the President or the stakeholder community from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2 Charter

The charter of the Ombudsman shall be to act as an independent third party neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board, ICANN contracted third parties, or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an independent third party objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, ICANN contracted third parties, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "~~shuttle~~ diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2.

Section 5.3 Operations

The Office of Ombudsman shall:

- (a) facilitate the fair, neutral, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (~~excluding employees and vendors/suppliers of ICANN~~) may have with specific actions or failures to act by the Board, or ICANN staff, or ICANN contracted third parties which have not otherwise become the subject of either a Reconsideration Request or Independent Review Policies;
- ~~(b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;~~



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- (c) exercise discretion to accept or decline to act on a complaint or question, ~~including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community~~ so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
- (d) have the right to have access to (but not to publish if otherwise such material qualifies as privileged, as defined by law, or is subject to confidentiality restrictions apply) all necessary information and records from ICANN Board, staff, ICANN contracted third parties, and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or ~~any generally~~ applicable confidentiality policies adopted by ICANN);
- (e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability;
- (f) maintain neutrality, objectivity, and independence, and have no bias or personal stake in an outcome; and
- (g) comply with all ICANN conflicts-of-interest and confidentiality policies.

Section 5.4 Interactions with ICANN and Outside Entities

... (b) ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office, provided the Ombudsman provides written justification for not producing such information.

... (d) The Ombudsman shall be specifically authorized to make such reports to the Board as ~~he or she deems appropriate required~~ with respect to any particular matter and its resolution or the inability to resolve it. ~~Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, S~~uch reports shall be posted on the ICANN Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, ~~and in particular shall not institute, join, or support in any way any legal actions challenging ICANN structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies.~~

Section 7.18 Actions by Telephone Meeting or by Other Communications Equipment

... ICANN shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit Directors and Liaisons to participate by telephone and it will be recorded and published on ICANN's website.



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Section 7.21 Board Rights of Inspection

...**(b) ICANN shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information only when such information qualifies as privileged, as defined by law, or is subject to confidentiality restrictions imposed by contract.**

Section 20.1 Indemnification Generally

ICANN shall, to the maximum extent permitted by the CCC, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN, provided that the indemnified person's acts ~~were done in good faith and in a manner that the indemnified person reasonably believed to be did not rise to the level of negligence, was~~ in ICANN's best interests and not criminal. For purposes of this Article 20, an "agent" of ICANN includes any person who is or was a Director, Officer, employee, contracted third party acting on behalf of ICANN, or any other agent of ICANN (including a member of the EC, the EC Administration, any Supporting Organization, any Advisory Committee, the Nominating Committee, any other ICANN committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN as a Director, Officer, employee, contracted third party or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN would have the power to indemnify the agent against that liability under the provisions of this Article 20.

Section 20.2 Indemnification with Respect to Director Removal

If a Director initiates any proceeding in connection with his or her removal or recall pursuant to the Bylaws, to which a person who is a member of the leadership council (or equivalent body) of a Decisional Participant or representative of a Decisional Participant in the EC Administration is a party or is threatened to be made a party (as a party or witness) (a "Director Removal Proceeding"), ICANN shall, to the maximum extent permitted by the CCC, indemnify any such person, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such person in connection with such Director Removal Proceeding, for actions taken by such person in his or her representative capacity within his or her Decisional Participant pursuant to the processes and procedures set forth in these Bylaws, provided that all such actions ~~were taken by such person in good faith and in a manner that such person did not rise to the level of negligence,~~ reasonably believed to be in ICANN's best interests and not criminal.



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Conclusion

In conclusion, if ICANN's objective is to be truly independent of U.S. government oversight and hold the responsibility as the governing Internet domain space regulator, then ICANN should take full responsibility, accountability and liability for all its actions or inactions (including actions and inactions of the Board, staff, agents or contracted third-parties) that contravene the law, its Articles of Incorporation or Bylaws.

A neutral and independent expert panelist in a recent IRP decision stated:

“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”...”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.”... “independent judgment, transparency and accountability, as to decision-making that is essentially judicial in nature, regarding matters of extreme public import and interest, should not be set aside by resort to technical rules of construction contrary both to equity and to applicable principles of law.”...“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.”... 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.”... “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.’” (Donuts Inc. v. ICANN (.SPORTS/RUGBY), May 16, 2016, at <https://icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf>)

A neutral U.S Federal Court Judge also determined that:

“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 enforceability of the Release due to California Civil Code § 1668, the



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Court need not address DCA's arguments regarding unconscionability or procurement by fraud." (R. Gary Klausner, U.S. District Judge, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*, Case No. 16-CV-00862, April 12, 2016, <https://www.icann.org/en/system/files/files/litigation-dca-icann-motion-prelim-injunction-12apr16-en.pdf>).

Thus far, the Internet community has been ineffective in holding ICANN accountable and has been unable to increase ICANN's transparency. Mechanisms to increase transparency and accountability measures, such as the IRP, the DIDP, the Request for Reconsideration process, the Ombudsman and many other mechanisms have been futile, a waste of resources and ineffective.

As such, it is DotMusic's opinion that the draft new ICANN Bylaws urgently require significantly more responsible, meaningful and impactful revisions to hold ICANN accountable and increase transparency (including those suggested by DotMusic earlier). Internet users deserve a stronger end product, especially since it is highly likely that any future Bylaws revisions will be many years away.

DotMusic respectfully urges ICANN to allow more time so that the new ICANN Bylaws are fine-tuned and finalized in a more prudent manner, including giving constituents the ability to have additional discussions to settle overarching issues that impact the public interest and Internet users, some of which DotMusic has noted earlier.

Respectfully Submitted,

Constantine Roussos
 Founder
 DotMusic

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