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Contact Information
Redacted

March 7, 2018

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

Re: Jones Day Letter to DotMusic in relation to DotMusic’s CPE Review Analysis

Dear Members of the ICANN Board and Jones Day:

We write on behalf of our client, DotMusic Limited (“DotMusic”), in regards to a March 5, 2018 letter sent to DotMusic by Jones Day (the “Jones Day Reply”).¹ The Jones Day Reply purports to be sent at the direction of the ICANN Board in response to DotMusic’s CPE Process Review Analysis, dated February 2, 2018 (the “.MUSIC CPE Analysis”).²

It is curious that, in response to a 66-page analysis, Jones Day does not respond to the in-depth discussion presented, but rather chose to selectively misrepresent the .MUSIC CPE Analysis. It appears an individual at Jones Day (or the ICANN Board) reviewed the .MUSIC CPE Analysis and chose to reference items entirely out of context and in bad faith.

We were surprised by the incendiary language used by Jones Day to describe our analysis. Incredulously, Jones Day states that:

[T]he [ICANN] Board has asked us to respond to certain **baseless** and **offensive statements** that must be immediately addressed and rejected at the outset. [...]

Specifically, your **bald assertion** that “the FTI ‘compliance-focused investigation methodology’ was constructed in part **to exonerate ICANN** of any accountability and responsibility” has no basis whatsoever [...].³

We are surprised by the language used in the Jones Day Reply. Our response is described as baseless, offensive and bald, even though, as shown by the following excerpts, we respectfully

¹ See Kate Wallace (Jones Day) letter to Constantine Roussos and Jason Schaeffer (DotMusic), Re: CPE Review (March 5, 2018), <https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf> (hereinafter, “Jones Day Reply”).

² See Constantine Roussos and Jason Schaeffer, Analysis of .MUSIC Community Priority Evaluation and FTI Reports prepared for ICANN Board (January 31, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf> (hereinafter, “.MUSIC CPE Analysis”).

³ Jones Day Reply (emphasis added).

stated, after a comprehensive and thoroughly referenced discussion and analysis that, among many other things:

69. This leads to the **inference** that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility.

82. [...] FTI’s finding that “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process” **appears** to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a **reasonable inference** that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation **would lead a reasonable person to conclude this**.⁴

The language selected by DotMusic was respectful – not “offensive” – and supported by evidence and facts.

DotMusic’s position is backed by a 66-page detailed analysis with supporting evidence. When the .MUSIC CPE Analysis is coupled with the results of the Dot Registry IRP, the Council of Europe Report, and other public statements, it clearly gives rise to fair questions about the propriety and validity of FTI’s “independent” review. Based on these reports, it is clear that FTI failed to perform a proper and complete review of the CPE process. FTI did not re-evaluate the CPE applications, rely upon the substance of the reference material, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview the CPE applicants. Given these failures, it is reasonably inferable that FTI’s conclusions are nothing more than attempt to defend a clearly problematic evaluation process.⁵

⁴ .MUSIC CPE Analysis, pp. 48, 51, 65 (emphasis added).

⁵ FTI concludes that (1) “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process;” (2) “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE;” and (3) “the CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1);

The Jones Day Reply unjustifiably criticizes the .MUSIC CPE Analysis as being without “any evidence.”⁶ DotMusic has even attempted to obtain further supporting evidence from ICANN. It submitted *three* document requests pursuant to ICANN’s Documentary Information Disclosure Policy⁷ for materials related to FTI’s review—such as FTI’s investigative plan.⁸ ICANN has continuously refused to disclose any documents regarding FTI’s review,⁹ and now criticizes us for lacking evidence.

The .MUSIC CPE Analysis was provided to the ICANN Board in good faith to allow the Board to conduct its own due diligence in making a reasoned determination in response to Reconsideration Request 16-5 and rebut the FTI Reports, which are inconsistent with other findings regarding the CPE Process.

It would be helpful for all concerned parties to proceed without resorting to misrepresentation and engaging in disparate and discriminatory treatment against DotMusic as highlighted by the Jones Day Reply.

DotMusic reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

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(ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).” Scope 1 Report, p. 17; Scope 2 Report, p. 3; Scope 3 Report, p. 4.

⁶ Jones Day Reply (emphasis added).

⁷ Request No. 20170505-1 (May 5, 2017); Request No. 20170610-1 (June 10, 2017); Request No. 20180110-1 (January 10, 2018).

⁸ Request No. 20180110-1 (January 10, 2018).

⁹ Request No. 20170505-1, ICANN DIDP Response (June 4, 2017); Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017); Request No. 20180110-1, ICANN DIDP Response (February 9, 2018).