



3.22.2016

Chris Disspain
Chair, ICANN Board Governance Committee
12025 Waterfront Drive
Suite 300
Los Angeles, CA 90094

Re: DotMusic Limited Request for Reconsideration 16-5

Dear Mr. Disspain:

As the Principals of Far Further/.Music LLC (“.Music”), we write to you and the ICANN Board Governance Committee (“BCG”) reluctantly, but feel compelled to do so. We are concerned about the risk of inconsistent and unfair treatment of gTLD applicants with respect to community priority applications. We hope that internal ICANN processes will address our concerns (which we know are shared by others).

.Music was one of several parties that applied for the gTLD string MUSIC, and for community priority for that string for a global music community. DotMusic Limited (“DML”) applied for community status for the same string, for essentially the same community. The Community Priority Evaluation Panel reviewed .Music’s community application on October 7, 2014, awarded .Music only three out of a possible 16 points, and denied the application.¹ On November 18, 2014, the Board Governance Committee affirmed the Panel’s decision.² We thought these decisions were in error—and inconsistent with decisions made in other community priority evaluations such as .ECO, .HOTEL, and .RADIO. For now, however, we are concerned only with ensuring that similarly situated applicants are treated alike, and, thus, that DML only be granted community status if that status is also granted to .Music.

DML was not invited to begin CPE until July 29, 2015—more than a year after .Music’s invitation and more than nine months following .Music’s CPE Determination. This delay worked to DML’s advantage, since it had more time to seek community support than did .Music.

¹ Community Priority Evaluation Report (Oct. 6, 2014), *available at* <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>.

² Reconsideration Request Form, *available at* <https://www.icann.org/en/system/files/files/request-music-with-annexes-22oct14-en.pdf>.

Even with this advantage, on February 10, 2016, DML’s community priority application was denied by the CPE Panel, which awarded DML only 10 out of the possible 16 points.³ On February 24, 2016, DML filed Request for Reconsideration (“RfR”) 16-5, asking that the CPE Determination be overturned.⁴ It followed up with a supporting letter on March 17th.

We write simply to ask that the ICANN Board act consistently and apply the same standards to all parties as it considers DML’s reconsideration request. If the BGC grants RfR 16-5, it must also grant .Music’s RfR (14-45) and its application. DML’s March 17 letter cites portions of Governmental Advisory Committee “Advice,” as well as ICANN Board and NCPG Resolutions, to allege that ICANN’s failure to accept DML’s “community” definition was a violation of these Resolutions and ICANN’s by-laws.⁵ If DML is correct, its reasoning applies equally to .Music’s application and RfR, because DML requested community status for the same string as .Music and defined an effectively identical community. ICANN must therefore evaluate DML’s application consistently with its evaluation of .Music’s and deny it. Alternatively, if it grants DML’s request for reconsideration, it must do the same for .Music’s.

As the Board knows, ICANN must operate consistently with its by-laws.⁶ The Board has undertaken to treat all members of the ICANN community equally, and to act in a reasonable, objective, and informed manner in making decisions.⁷ Moreover, the BGC acts on authority delegated by the Board when it reviews requests for reconsideration.⁸ In light of ICANN’s commitment to equality and to fidelity to its by-laws, any irregularity in its evaluation of applications for the MUSIC gTLD—including requests for reconsideration of CPE denials—would be *ultra vires* and void, and constitute unlawful action by the Board itself.

In considering how to evaluate DML’s reconsideration request fairly, we note that the BGC affirmed the Panel’s determination not to award .Music community status, and that BGC opinions “establish[] precedential value.”⁹ In its opinion, the BGC stated that in the context of gTLD reviews, it does not evaluate the Panel’s substantive conclusion, and that its review is limited to whether the Panel violated any policy or procedure;¹⁰ however, in the body of its opinion, the BGC held that the Panel “Properly Applied the CPE Criteria.”¹¹ Thus it is BGC precedent that under a proper application of Criteria 1 and 2, an application for the string MUSIC

³ Community Priority Evaluation Report (Feb. 10, 2016), *available at*

<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁴ DotMusic Reconsideration Request, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

⁵ Letter from Tina Dam, COO DotMusic Ltd. to ICANN and Board Governance Committee (Mar. 17, 2016), *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>.

⁶ ICANN by-laws Art. IV, § 1.

⁷ ICANN Expected Standards of Behavior, *available at* <https://www.icann.org/resources/pages/expected-standards-2012-05-15-en> (last visited May 20, 2015).

⁸ ICANN by-laws Art. IV, § 2.3 (“The Board has designated the [BGC] to review and consider any such Reconsideration Requests.”); § 2.15 (“For all Reconsideration Request brought regarding staff action or inaction, the [BGC] shall be delegated the authority of the Board . . .”).

⁹ ICANN by-laws Art. IV, § 2.15.

¹⁰ BGC Nov. 18, 2014 Op. at 4.

¹¹ BGC Nov. 18, 2014 Op. at 5, 8, 9 & 11.

for a broad, global music community cannot receive community priority status.¹² If the BGC granted RfR 16-5, it would not simply be inconsistent with its earlier reasoning; it would violate BGC precedent, because DML's application is substantially the same as .Music's and its consideration must follow the same analysis. Likewise, a BGC decision affirming such a ruling would violate ICANN rules and precedent, and would be imputable to the Board itself.¹³

Any decision granting RfR 16-5 or reversing the DML CPE decision without providing .Music the same relief would violate ICANN by-laws and be a troubling departure from BGC precedent and the Panel's own logic. It would indicate significant irregularities in ICANN's community priority evaluation process. .Music encourages the Board to ensure ICANN adheres to its commitment to fair treatment and consistency, and to respect the precedential value of earlier BGC decisions by denying DML's Request for Reconsideration.

If ICANN ultimately grants RfR 16-5 and awards DML community priority status for the string MUSIC in violation of its by-laws and prior precedent, .Music will consider ICANN's gTLD consideration process to be an unlawful, unfair, or fraudulent business act or practice and will reserve all its rights to any available recourse including under California law.¹⁴

If you have any questions please do not hesitate to contact us.

Sincerely,

John Styll Loren Balman
President/COO CEO
.Music LLC - a Far Further Company
179 Belle Forest Cr.
Suite 104
Nashville TN. 37221 USA

cc: Steve Crocker, ICANN Board Chair
Akram Atallah, Interim President & CEO
John Jeffrey, Esq., General Counsel & Secretary

Scott Blake Harris
Harris, Wiltshire & Grannis LLP
Counsel to .Music, LLC

¹² The Panel correctly awarded DML 0 out of 4 points for Criterion 1, "community establishment."

¹³ ICANN by-laws Art. IV, §§ 2.3 & 2.15 (delegating Board authority to BGC).

¹⁴ See CAL. BUS. & PROF. CODE § 17200 *et seq.* (prohibiting unfair business practices).