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March 28, 2016

Chris Disspain, ICANN Chair of the Board Governance Committee (“BGC”), Board and NGPC Member;
 Dr. Steve Crocker, ICANN Chair of the Board and New gTLD Program Committee (“NGPC”) Member;
 Akram Atallah, ICANN Interim President and CEO;
 Cherine Chalaby, ICANN Chair of the NGPC, Vice-Chair of Board and BGC Member;
 Thomas Schneider, ICANN Government Advisory Committee Chair, Board and NGPC Liaison;
 Erika Mann, ICANN BGC, Board and NGPC Member;
 Rinalia Abdul Rahim, ICANN BGC, Board and NGPC Member;
 Mike Silber, ICANN BGC, Board and NGPC Member;
 Dr. Bruce Tonkin, ICANN BGC and Board Member;
 Suzanne Woolf, ICANN BGC and Board Liaison;
 John Jeffrey, ICANN General Counsel; and
 Chris LaHatte, ICANN Ombudsman

Re: Response to .MUSIC LLC’s (“Far Further”) Letter; International Law and Conventions

Dear ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board:

We write in response to the letter submitted by Far Further¹ attempting to obstruct the .MUSIC Reconsideration Request 16-5² (“RR”). This repeated pattern of behavior of filing spurious letters and abuse of accountability mechanisms³ is misguided and anti-competitive. The Far Further letter was intended to purposely derail the RR to serve the interests of Far Further’s shareholders not the interests of Far Further’s supporting organizations, many of whom are RR co-filers⁴ or have supported the RR.⁵ Please note that DotMusic’s application has received more support than all CPE applicants combined.⁶

On November 18th, 2014, the BGC rejected⁷ a Reconsideration Request 14-45 filed by Far Further concerning their CPE Report (released on October 7, 2014), which scored 3 points and did not pass.⁸

The GAC Category 1 Resolutions were accepted by the Board and the NGPC on February 5th, 2014⁹ (i.e. before Far Further’s CPE result).

¹ <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-music-llc-to-icann-22mar16-en.pdf>

² <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

³ For example, Far Further attempted to obstruct DotMusic’s Public Interest Commitments (against the interests of the majority of Far Further’s supporting organizations that have also supported DotMusic) by filing a Reconsideration Request 15-6, which was rejected by the BGC on May 6th, 2015. See BGC Reconsideration Request Determination 15-6, <https://icann.org/en/system/files/files/determination-15-6-music-06may15-en.pdf>

⁴ RR co-filers - the International Federation of Musicians, Association of Independent Music, American Association of Independent Music, Independent Music Companies Association and the Nashville Songwriters Association International - are also Far Further supporting organizations. Yet, Far Further opposes the RR against their interests.

⁵ See letter from the International Federation for the Phonographic Industry, <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

⁶ DotMusic is supported by organizations with members representing over 95% of music consumed globally: See <http://music.us/supporters>. An overwhelming majority of Far Further’s supporting organizations have also supported DotMusic. DotMusic’s logical alliance of supporting music organizations is the largest ever amassed for a music cause.

⁷ BGC Determination 14-45, <https://icann.org/en/system/files/files/determination-music-18nov14-en.pdf>

⁸ <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>



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Far Further chose not to file for relief or utilize other accountability mechanisms to challenge the BGC’s Reconsideration Request 14-45 decision or any ICANN action/inaction relating to GAC Category 1 Resolutions. Rather than initiating a timely Independent Review Proceeding (or timely invoking any other ICANN accountability mechanism), Far Further waited nearly a year and a half after the BGC decision on their Reconsideration Request 14-45 to speak out – and only did so as to challenge DotMusic’s RR. As such, any claim by Far Further is time-barred.¹⁰ Furthermore, according to the BGC, Far Further did not identify any procedural failures with respect to their CPE. The BGC’s Determination noted that Far Further (i) “*claim[ed] that the number of points awarded by the CPE Panel for various criteria was ‘wrong’;*” and (ii) did “*not claim that the CPE Panel violated established policy or procedure, but instead improperly challenge[d] the CPE Panels’ substantive determination.*”

In contrast, the RR filed by DotMusic and co-requesters relate to process violations and contravening established procedures. Contrary to Far Further’s flawed assertions that “*the BGC affirmed the Panel’s determination not to award [Far Further] community status, and that BGC opinions “establish[] precedential value,”*” the BGC cannot determine the RR based on another applicant’s application in this manner. While “*consistency of approach in scoring Applications*” is “*of particular importance*” to “*exercise consistent judgment...to reach conclusions that are compelling and defensible,*”¹¹ it is important to note that Far Further’s application and Request for Reconsideration 14-45 are completely different to DotMusic’s application (or those applications that have passed CPE) and RR. Agreeing to such an improper request would violate established AGB procedures to “*ensure applications are evaluated in an objective and independent manner*”¹² and to “*avoid any double-counting.*”¹³ As such, the BGC must follow ICANN processes to provide fair and equitable, reasonable and non-discriminatory treatment.¹⁴

The claim by Far Further that DotMusic “*applied for community status for the same string, for essentially the same community*” is factually imprecise because DotMusic’s definition of the music community (“*a strictly*

⁹ See Approved ICANN Board Resolutions, <https://icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>; Also see <https://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>, <https://icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>

¹⁰ See ICANN Accountability Mechanisms timing at <https://icann.org/resources/pages/mechanisms-2014-03-20-en>

¹¹ See CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

¹² See AGB, Module 2, Evaluation Procedures, 2.4.3.1, p. 2-33

¹³ See AGB, Module 4.2.3, pp. 4-9 - 4-10 (“The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to 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”)

¹⁴ The BGC must conduct adequate diligence to ensure that ICANN’s policies and procedures are applied fairly and in an open and transparent manner. It is well recognized under principles of international law that the obligations to treat entities fairly and equitably are “related to the traditional standard of due diligence,” which international tribunals have defined as requiring the reasonable amount of prevention that one would expect well administered organization to provide. See e.g. CME v. Czech Republic, Partial Award of Sept. 13, 2001, <http://italaw.com/sites/default/files/case-documents/ita0178.pdf>, ¶614, p.174 (Unfair and inequitable treatment, ...unreasonable actions...are together a violation of the principles of international law); Lauder v. Czech Republic, Final Award of Sept. 2001, <http://italaw.com/sites/default/files/case-documents/ita0451.pdf>, ¶292, pp.67-68 (Fair and equitable treatment is related to the traditional standard of due diligence and provides a ‘minimum international standard which forms part of customary international law.’); In addition, ICANN’s obligation to conduct due diligence and exercise due care is an express area of focus when comparing contested actions of the Board to the Articles and Bylaws Art. IV, § 3(4)(b).



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*delineated and organized logical alliance of communities that relate to music*¹⁵) is entirely different from Far Further's stated community definition, which only covers four (4) million members and restricts registration to members of select music organizations.

Far Further lost three (3) points under *Registration Policies*, so even if they were awarded a full score in all other sections (including *Community Establishment* that relates to *cohesion*), Far Further would still not pass CPE. In contrast, DotMusic would pass CPE if the Panel followed established procedures and ICANN processes were "*in conformity with relevant principles of international law and applicable international conventions*" as mandated by ICANN's Articles of Incorporation that, among other things, calls for recognition of principles of international law and international conventions:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.¹⁶

As such, the BGC should accept the RR and recognize music community *cohesion* through "*applicable international conventions*," such as the 1886 Berne Convention (that relates to the protection of copyright signed by 170 countries¹⁷).

On that subject, please further note that The Economist, the parent company of the Economist Intelligence Unit (the "EIU"), also recognizes the Berne Convention because The Economist is reliant on copyright cohesion and international law protection¹⁸ to conduct its activities. According to The Economist's website:

Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).¹⁹

The Economist's own words invalidate the EIU's CPE Report rationale that "*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."*"²⁰ Concluding that there is "*no substantive evidence*" that the music community defined in its entirety has no cohesion (i.e. does not unite cohesively under international music copyright or is reliant on international conventions) is not a compelling and defensible argument. Indeed, in The Economist's own words: "*copyright applies globally*

¹⁵ As explicitly outlined in the AGB, DotMusic's "logical alliance" community definition explicitly meets the AGB criteria. According to the AGB, Module 4, 4.2.3, p. 4-12: "*With respect to "Delineation" and "Extension," it should be noted that a community can consist of...a logical alliance of communities.*"

¹⁶ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

¹⁷ Berne Convention for the Protection of Literary and Artistic Works of 1886 with 170 contracting countries (See http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15)

¹⁸ See The Economist website, *Terms of Use, "Governing Law and Jurisdiction,"* <http://economist.com/legal/terms-of-use>, ("*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence.*")

¹⁹ See The Economist website, *Copyright Information,* <https://economist.com/rights/copyright.html>

²⁰ DotMusic .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, p.4



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and is regulated by a number of international treaties and conventions.” It thus appears that the EIU failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of “*application materials and...research*” as “*substantive evidence*” of “*cohesion,*” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified that:

The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the **Berne Convention**, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.²¹

To that end, as mentioned in our previous letter, in 2014, the members of the ICANN Board and the NGPC (who are also members of the BGC) accepted GAC Category 1 Advice that .MUSIC is a “*string that is linked to regulated sector*” that “*should operate in a way that is consistent with applicable laws;*”²² a Resolution that, in effect, agrees that all music groups that comprise the music community defined (“*logical alliance of communities that relate to music*”) participate as a whole in a regulated sector with demonstrated activities tied to music that cohere to international copyright law, united under international treaties, agreements and conventions.

We hope it is helpful to have provided you with clarifications in response to Far Further’s letter and to raise pertinent issues relating to international law and conventions. Thank you in advance for your consideration.

Please let us know should you have any questions.

Kind Regards,

Tina Dam
 COO
 DotMusic

Cc: Constantine Roussos
 Founder
 DotMusic

Cc: Jason Schaeffer
 Legal Counsel
 DotMusic

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

²¹ See DotMusic Public Interest Commitments (“PIC”),

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

²² <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2