

ARIF HYDER ALI

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28 April 2017

VIA E-MAIL

Mr. Göran Marby
President and Chief Executive Officer
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

ICANN Board of Directors
c/o Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Dot Music Reconsideration Request concerning .MUSIC

Dear President Marby and Members of the Board:

We write on behalf of our client, DotMusic Limited (“DotMusic”), to inquire when the ICANN Board Governance Committee (the “BGC”) will issue its final decision on DotMusic’s Reconsideration Request 16-5 regarding the .MUSIC top-level domain (the “Reconsideration Request”).¹ We further write to protest ICANN’s lack of transparency in its treatment of DotMusic’s application and ICANN’s failure to provide any sort of response to DotMusic’s various inquiries about the status of its application.

DotMusic submitted its Reconsideration Request *more than one year ago* and *nearly seven months* have passed since DotMusic delivered a presentation to the BGC. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on DotMusic’s Reconsideration Request and ICANN’s continued lack of responsiveness to DotMusic’s inquiries about the status of our request a clear

¹ Reconsideration Request 16-5 (24 February 2016), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

violation of ICANN's commitments to transparency enshrined in its governing documents.²

Further, it is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"³ and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."⁴

DotMusic wrote three months ago to ICANN seeking the disclosure of the identity of the individual or organization conducting the independent review ("evaluator") and informing ICANN that it had not received any communication from the independent evaluator.⁵ Both of these requests remain unaddressed.

ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Moreover ICANN Board Members have stated in public fora that the independent review "[] has been happening *for a little while. We don't have an actual date for completion yet.*"⁶ While ICANN Board members have indicated that ICANN would post an update as to the status of the review following ICANN 58 in March 2017, no such

² See letter from Arif Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

³ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁴ Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ Letter from Arif Ali to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017)

⁶ ICANN Copenhagen Meeting 58, statement by Chris Dispain at p.91 http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf

update has been provided. Further, ICANN's refusal to disclose the identity of the individual(s) carrying out the review raises the risk of conflicts of interest. Such a conflict would undermine ICANN's stated purpose of restoring trust and confidence to the CPE process, and call into question the validity of any resultant report to ICANN's Board. ICANN should therefore disclose the identity of the independent evaluator and its method of selection without further delay.

ICANN's refusal to disclose the scope of the review violates its Bylaw commitment to procedural fairness and transparency.⁷ DotMusic has no assurance that the reviewer will take into account DotMusic's extensive submissions in any report prepared for ICANN's Board.

DotMusic's rights are thus being decided by a process about which it: (1) possesses minimal information; (2) carried out by an individual or organization whose identity ICANN is shielding; (3) whose mandate is secret; (4) whose methods are unknown; and (5) whose report may never be made public by ICANN's Board. The exclusion of directly affected parties from participation eerily reproduces the shortcomings of the EIU evaluations that are under scrutiny in the first place.

With this letter, we renew our request that ICANN extend DotMusic, and the global music community that has supported its community application, a response to its inquiries regarding the anticipated resolution of DotMusic's Reconsideration Request.

Further, we request disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or agency ("evaluator") undertaking the review.

⁷ ICANN Bylaw Art.I § 3 "*Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*" ICANN Bylaw Art.III § 3 "*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.*"

2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment.
3. The date of appointment of the evaluator.
4. The terms of instructions provided to the evaluator.
5. The materials provided to the evaluator by the EIU.
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board.
7. The materials submitted by affected parties provided to the evaluator.
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.
9. The most recent estimates provided by the evaluator for the completion of the investigation.

ICANN must immediately ensure that the evaluator communicates with DotMusic as part of the evaluation process in order to afford DotMusic the fundamental due process right to be heard and treated fairly. We reserve the right to request further disclosure based on ICANN's prompt provision of the above information. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence or withholding of information.

DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,



Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)