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March 17, 2016

Dr. Steve Crocker, ICANN Chair of the Board and New gTLD Program Committee (“NGPC”) Member;
 Akram Atallah, ICANN Interim CEO;
 Chris Disspain, ICANN Chair of the Board Governance Committee (“BGC”), Board and NGPC Member;
 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

Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC

Dear ICANN and Board Governance Committee:

We write to you to remind you of the consensus GAC Category 1 Advice Resolutions that were accepted by the ICANN Board and NGPC in 2014, which set precedent for DotMusic’s CPE and RR.

As you may be aware, DotMusic (with Application ID 1-1115-14110)¹ and ten (10) other globally-recognized music community organizations recently filed a Reconsideration Request 16-5² (“RR”) concerning the .MUSIC CPE Report³ (“Report”). The Report did not follow numerous established processes and policies or recognize international law, agreements, treaties or conventions concerning the music community.

To that end, in 2014 the ICANN Board and the NGPC 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*;⁴” 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 copyright law, united under international treaties, agreements and conventions.⁵ Despite this acceptance, the Report did not recognize the music community or

¹DotMusic community Application (ID 1-1115-14110), <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392>

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

³DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

⁴<https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2

⁵The ICANN’s Board’s and NGPC’s Resolutions (2014.02.05.NG01) provide that the music community defined in its entirety abides to copyright law that provides protection for copyrightable work once it is created (i.e. “fixed in a tangible medium of expression”) regardless whether it is commercial or not. International conventions, treaties and agreements include the Berne Convention for the Protection of Literary and Artistic Works of 1886 with 170



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evaluate the Application in a manner that acknowledges that music is a globally regulated sector united by copyright law with cohesion and recognized international rights protections.

The Resolution, consistent with applicable international law and a cohesive music regulated sector, provides, in pertinent part:

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program. Resolved (2014.02.05.NG01), the NGPC adopts the "GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates" (5 February 2014), attached as Annex 1⁶ to this Resolution, in response to open items of Beijing, Durban and Buenos Aires GAC advice as presented in the scorecard.⁷

This means that the ICANN Board and NGPC have accepted that the music community, in its entirety, has cohesion based on international law. The above-referenced Resolution alone should have led to a prevailing DotMusic CPE.⁸

Given the overlap between the ICANN Board, NPGC and the BGC, DotMusic believes it would be helpful for BGC members to be reminded of the relevancy of the 2014 Resolution to the CPE process and in assessing the RR in accordance to ICANN's Bylaws. The Bylaws establish that "*ICANN 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.*"⁹ This Bylaw reflects the prohibition on discrimination where "*(i) similar cases are (ii) treated differently (iii) and without reasonable justification.*"¹⁰

As such, BGC members cannot render a RR determination that does incorporate established ICANN policy and Resolutions (2014.02.05.NG01) because it would violate ICANN's Bylaws and be grossly negligent and create irreparable harm to the Applicant and the Community.

Furthermore, at the Meeting of the ICANN Board on March 10, 2016, the Board affirmed the serious issues that were raised by an Independent Review Proceeding Panel concerning lack of consistency or predictability in the CPE process. The Board resolved that:

contracting countries (See http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) and the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 ("TRIPS") with 162 contracting countries (See http://wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22)

⁶ <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>

⁷ Approved Resolutions, Meeting of the New gTLD Program Committee, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>, <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>, <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>

⁸ The Reconsideration Request 16-5 includes additional process violations and other related issues. The lack of implementation of the ICANN Resolutions is only one of these. However, it is sufficient to overturn the CPE result.

⁹ Bylaws, <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>, Art. II, § 3

¹⁰ Saluka Investments B.V. v. The Czech Republic, UNCITRAL, <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>, p.67, ¶ 313



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Resolved (2016.03.10.11), the Board notes the Panel's suggestions, and: directs the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations.¹¹

ICANN must apply policy Resolutions in all evaluations to ensure transparency, predictability and consistency according to its Bylaws, regardless whether or not a Panel chooses to contravene ICANN process-related Resolutions or relevant facts originating from these Resolutions in its Report. As its consulting agreement with ICANN states, the Panel is a consultant. ICANN is the ultimate decision-maker.

We look forward to a positive result of the RR so that the Music Community is able to launch a safe, trusted and secure .MUSIC gTLD in a timely manner to serve the public interest and benefit the Music and general Internet Community.

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>

¹¹ <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>