

THE DOMAIN NAME LAW FIRM



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Robin Bew, Managing Director, Economist Intelligence Unit (EIU)  
Dr. Steve Crocker, Chairman of the ICANN Board  
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Akram Attallah, ICANN President of Generic Domains Division  
Christine Willett, ICANN Vice-President of gTLD Operations

**RE: Far Further/.music LLC's Application for .MUSIC ID: 1-959-51046<sup>1</sup>**

To the EIU and ICANN:

On behalf of DotMusic, Limited (Dot Music), please accept this letter in response to Far Further/.music LLC's ("Applicant") Public Comment<sup>2</sup> dated July 3, 2014 ("July Public Comment") regarding application ID 1-959-51046 (the "Application") currently under Community Priority Evaluation ("CPE") review.

For the new gTLD and CPE processes to be effective, ICANN and the EIU must be able to properly evaluate and grade an application and verify the statements contained therein. Moreover, in the case of sensitive strings like .MUSIC, the community and public must be able to fully understand an applicant's position and be able to support or hold the applicant accountable. As noted below, the July Public Comment raises additional concerns regarding inconsistent policies, exclusive access language and a lack of name selection and content and use policies that could harm the community.

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<sup>1</sup> <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

<sup>2</sup> <http://www.icann.org/en/system/files/correspondence/frankenheimer-to-crocker-chehade-03jul14-en.pdf>

As you may be aware, DotMusic, music community members and other concerned applicants have submitted formal requests, statements, and public comments pertaining to Applicant's stated policies and positions. To date, ICANN has failed to take any action in response to DotMusic's repeated requests to address inconsistencies in Applicant's policies<sup>3</sup>, particularly with respect to Applicant's "exclusive access" language and its response to GAC Category 2 Advice. Now, Applicant's July Public Comment contains statements and admissions that raise additional concern. We note the following issues that exemplify an inconsistent Application, which appears to be misaligned with its articulated community-based purpose:

1) In defense of its "Community Definition," Applicant's July Public Comment provides that its original answer to Q20(a) was in error. While the plain language of the Application requires "[c]urrent affiliation and/or verifiable membership in a Music community organization that was organized and in existence prior to 2007" (emphasis added), Applicant now states that the language requiring membership in an organization pre-dating 2007 was "a drafting error." July Public Statement at ¶6.

While it is possible that Applicant made an "error" in its Application, given the length of time that has passed since Applications were filed, and the fact that this restrictive "Community Definition" was the subject of a Community Objection, such excuse strains the imagination.

Applicant was placed on notice multiple times over the past two (2) years that many in the music community were troubled by this exclusionary policy that, if left in the Application, would exclude a significant portion of members of the music community that are affiliated with organizations formed after 2007. Indeed, in March 2013, Applicant received and later responded to a formal Community Objection filed on behalf of the International Federation of Arts Councils and Culture Agencies (IFFACA), which, in part, specifically challenged this "pre-2007" exclusionary policy. At that time Applicant did not respond that this policy was a mere "drafting error" but rather it defended its position.

In October, 2013, Applicant was again required to review its policies and respond to GAC Category 2 Advice on the issue of "exclusive access." Instead of remedying this alleged "drafting error," the Applicant responded to GAC Category 2 Advice by identifying that it is not an exclusive access Registry.<sup>4</sup> Only after Applicant was invited

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<sup>3</sup> As mentioned in prior correspondence with ICANN, it would be grossly unfair to other applicants for ICANN to let .music LLC "fix" the same concerns expressed by Objectors in the ICC proceedings without accountability or repercussion.

<sup>4</sup> <http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-959-51046-en.pdf>

to CPE, in response to negative public comments<sup>5</sup> and non-negligible relevant opposition,<sup>6</sup> did Applicant submit its July Public Comment identifying the policy as an “error.” At no time has Applicant sought to change its Application or file a change request to clarify its position or “fix” its exclusionary policies.

2) The Application still provides that the Applicant will be the “sole registrar” operating with resellers (Affiliates) that are only comprised of Community Member Associations formed before 2007. Over the past two years, significant debate and discussion by GAC (and the ICANN NGPC) made it clear that “closed generics” are against the public interest. Thus, the Applicant was on notice to review its policies and address potential issues with its Application. Again, Applicant took no action to amend or “fix” its policies. In response to GAC Advice Category 2 pertaining to Exclusive Access, Applicant responded that it was not an exclusive access registry and attested that its Application did not state that it will be operated as an exclusive registry.<sup>7</sup> This representation runs counter to Applicant’s policies which expressly provide that .music LLC will be the “*sole registrar*” with resellers (Affiliates) that are only composed of Community Member Associations formed before 2007.

While it now appears that the new Registry Agreement will not permit this type of “sole registrar” structure,<sup>8</sup> Applicant’s anti-competitive intent remains clear. Applicant twice reiterates its intention to be the “sole registrar” through its answer to Question 28.4.3 of its Application to illustrate its “exclusive access” model:

*The dotMusic Registry intends to operate as a sole registrar model but will offer exclusive reseller services for music associations to sell domain names to their memberships.*

*.Music Registry will set itself up as a sole registrar, providing reseller capability to Community Member Associations (i.e. Affiliates), who will in*

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<sup>5</sup> <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>6</sup> <http://www.icann.org/en/system/files/correspondence/roussos-to-crocker-et-al-01jul14-en.pdf>, Opposition Letters, Appendix B and Appendix C, P.74-107

<sup>7</sup> <http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-959-51046-en.pdf>

<sup>8</sup> According to the ICANN new gTLD registry agreement associated with the Applicant Guidebook: *[The] Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD (the “Registry-Registrar Agreement”).* <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-02jul13-en.pdf>

*turn sell .Music domains to their memberships.” (Application Answer to Question 28.4.3).<sup>9</sup>*

We have communicated with ICANN multiple times to state our concerns regarding Applicant’s anti-competitive exclusive access policies contained in the Application.

By filing its response to GAC Advice and in not filing a change request, the Applicant has provided inconsistent statements. Now that Applicant has been invited to Community Priority Evaluation, we reiterate our concern regarding these discriminatory policies that remain in the Application.

3) In its July Public Statement, Applicant defends its position that it lacks any meaningful name selection or content and use restrictions related to music. Applicant has essentially asked the EIU and the community to rely on Applicant’s “Acceptable Use Policy” (“AUP”) to provide a meaningful policy to maintain the integrity of .MUSIC domain names. However, Applicant’s AUP (contained in the answer to Q28), does little more than provide general anti-abuse policies and does not specify what type of content is permitted or required. Indeed, Applicant does not have any content and use or name selection policies restrictions that are tailored to the music community or aligned with its articulated community-based purpose.

Taken in isolation, any one of Applicant’s inconsistent statements and policies might be acceptable, but when viewed in total, the Applicant’s policies must be closely scrutinized.

Applicant’s July Public Statement requests that ICANN and the EIU accept the Applicant’s position and reject any form of opposition as irrelevant and negligible. Opposition by DotMusic (a community applicant with legitimate rights supported by a majority of the global music community<sup>10</sup>), a Community Objection filed by IFFACA,<sup>11</sup> opposition by over a dozen non-negligible, relevant organizations, in addition to other significant, relevant opposition (See “Joint Opposition Letter”<sup>12</sup> submitted on July 1, 2014 and Public Comments.<sup>13</sup>) is hardly “irrelevant or negligible.”

Applicant also concedes that “it would have been unrealistic to complete policies at the filing stage of the application,” and that “it is premature to complete the detail of such

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<sup>9</sup> <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

<sup>10</sup> <http://music.us/supporters.htm>

<sup>11</sup> <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/>

<sup>12</sup> <http://www.icann.org/en/system/files/correspondence/roussos-to-crocker-et-al-01jul14-en.pdf>, Opposition Letters, Appendix B and Appendix C, pp.74-107

<sup>13</sup> <https://gtldcomment.icann.org/applicationcomment/viewcomments>

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policies.” (See July Public Statement at ¶46, p.10). Applicant further states that it “will specifically address accreditation and registration policies and procedures, and naming policies” after the “application proceeds to contract with ICANN” and that .music LLC “believes it is premature, if not inappropriate, to set out in detail all of its launch policies until the PAB has been fully constituted.” (See July Public Statement at ¶49, p.11). These statements confirm that certain issues of potential misalignment warrant further review.

As such, we express our concern that Application appears to contain language that creates a “loophole” to circumvent its Registration Policies after they are reviewed and confirmed in CPE Evaluation. This policy “loophole” would allow Applicant to change its Registration Policies after delegation without ramification or accountability to the community or with regard to the public interest.

In sum, it is inappropriate for Applicant to request that the EIU and ICANN recognize Applicant’s “Community Status” by giving it a passing CPE grade based on future promises and “drafting errors,” while at the same time ignoring published concerns about its seemingly misaligned, inconsistent and vague policies.

Such policy-related issues, particularly when it comes to evaluation of a community application, cannot be taken lightly. This is precisely why Applicant’s statements must be carefully evaluated based on the language contained within the four corners of its Application. Not only does this issue directly affect the music community, it also has the potential of negatively impacting all competing applicants in the .MUSIC contention set.

Accordingly, we renew our request for close consideration of these specific points during CPE.

Respectfully submitted,

//JBS//

Jason Schaeffer  
As General Counsel for DotMusic Limited

cc: Constantine Roussos