

## **Reconsideration Request Form**

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requester Information**

**Name:** .Music LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

### **2. Request for Reconsideration of (check one only):**

Board action/inaction

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

There are two parts to this Request for Reconsideration.

A. ICANN staff approved a Change Request for DotMusic Limited (.music application 1-1115-14110) on 24 March 2015, prior to the applicant's invitation to begin CPE.

(<https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/1392>)

This Change Request is ostensibly a PIC Spec 11 submission, but is actually more than 300 pages of "clarifications" about the application's community definition and policies.

This is in direct violation of an ICANN "Applicant Advisory" published on 30 September 2014, which states in part:

*Approval of a change request to update a community definition and registration policies would allow a CPE applicant to update its application based on learnings from previously posted CPE results. This causes issues of unfairness to the first applicants that went through CPE and did not have the benefit of learning from others. Allowing such a change request would also improve the CPE applicant's chances to prevail in*

*CPE, negatively impacting the other applicants in the same contention set. Therefore, although viewed as necessary from the CPE applicant's perspective to maximize its ability to pass CPE, approval of a change request to update a community's definition and registration policies prior to the completion of CPE would cause issues of unfairness to other applicants in the same contention set. As ICANN's responsibilities are to ensure fair and equitable treatment for all applicants, all change requests of these types have been deferred until after CPE.*

<http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

B. Reconsideration of .Music LLC Change Request. On 27 May 2014, staff “deferred” a Change Request submitted for our .music application (1-959-51046), prior to our invitation to begin CPE, stating that it was “to be fair to other applicants” (see attachment). As this was prior to the 30 September “Applicant Advisory” there was no published policy in place at the time to guide this action by the ICANN staff. We are raising the issue now in connection with the approval of the DotMusic Limited Change Request on 24 March 2015.

**4. Date of action/inaction:**

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

24 March 2015 (Approval and posting of Dot Music Limited Change Request)

27 May 2014 (Deferral of .Music LLC Change Request)

**5. On what date did you become aware of the action or that action would not be taken?**

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

We became aware of the Change Request on 2 April 2015. We did not receive notification of it from ICANN, even though we are a competing applicant for the .music string. It was only through happenstance that we discovered it on 2 April. We immediately sent a query to the ICANN Customer Portal asking whether the material contained in the approved attachment would be part of the CPE by the EIU. We did not receive an answer until 6:02 p.m. (our local time) on 16 April 2015. This RfR is being filed on the next business day, which is also 15 days from the date we became aware of the action. We became aware of the “deferral” of our own Change Request on 27 May 2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

Until the publication of a new ICANN “advisory” on 30 September 2014, there was no policy prohibiting Change Requests prior to the start of CPE. ICANN staff created this policy “on the fly.” Although the Change Requests we submitted in May 2014 were relatively minor and non-material, they provided clarification in terminology and also corrected outright drafting errors that we believed would resolve certain issues that could negatively affect our CPE score. Therefore, having our Change Request “deferred” had a negative effect.

The material changes included in the instant Change Request for DotMusic

Limited are clearly intended to influence the CPE panel and thereby violate ICANN's published policy regarding Change Requests. Furthermore, the additional material far exceeds the word count allowed in TAS for the original application and TAS did not allow attachments for the purpose of extending the word count or expanding responses.

In response to our query about whether the EIU would be considering this material in its CPE determination, ICANN Customer Service stated, "DotMusic Limited is not seeking to make any changes to its application material, which is the subject of the EIU's CPE evaluation." It also stated, "As you are aware, during its evaluation, the EIU may take into consideration any publicly available information." No other applicants were afforded the opportunity to append their applications in this manner, and it is outrageous and unfair for ICANN to allow this applicant to abuse the PIC process in this way. It is tantamount to an application change.

ICANN's approval of this Change Request could benefit DotMusic Limited by giving it an unfair advantage at CPE because of disparate handling of the respective Change Requests. This is detrimental to our interests because if DotMusic Limited prevails it would eliminate our application from contention.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's approval of DotMusic Limited's Change Request gives it an unfair advantage in CPE, which is detrimental to the interests of the seven other applicants in the .music contention set.

## 8. Detail of Board or Staff Action – Required Information

**Staff Action:** If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

### **Provide the Required Detailed Explanation here:**

(You may attach additional sheets as necessary.)

A. The approval of the two-page PIC Spec portion of the Change Request submitted by DotMusic Limited has precedent, and for avoidance of doubt, we are not requesting that such approval of these two pages should be withheld. However, the 308 additional pages of “clarifications” contain wording that clearly utilizes learnings from previous CPE results (including our own), in violation of ICANN policy (<http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>). If our own Change Request is not approved and there is no opportunity for a re-set of our CPE, ICANN's disparate handling of these proposed changes would result in irreparable harm to our business.

B. .Music LLC submitted its Change Request in response to ICANN's unilateral re-interpretation of the AGB that was manifested in new “CPE Guidelines” created by the EIU and published by ICANN on 27 September 2013, long after the close of the application window.

(<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)

This Change Request met the parameters for Change Requests *at the time* and respected the character count restrictions of the original application. There were no published prohibitions at the time for such requests and, as far as we knew, no precedent for a “deferral.” (Incredibly, in its response to our query that we received yesterday, ICANN cites the 5 September 2014 “Applicant Advisory” as the reason our Change Request was deferred on 27 May 2014!) The “deferral” was tantamount to non-approval, and inconsistent with recent the approval of DotMusic Limited’s request. While ICANN claims that DotMusic Limited is not seeking to make changes to questions 18 and 20 of its application, there is nonetheless no precedent for such an expansive “clarification” to become part of an application.

**9. What are you asking ICANN to do now?**

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

The BGC should recognize the inconsistency of ICANN’s handling of the previously-described Change Requests. It should approve the previously-submitted .Music LLC Change Request and re-submit the application to the EIU for a new CPE with different panelists. At the very least, the BGC should rescind the staff approval of the non-PIC portion of the DotMusic Limited Change Request.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

(Include in this discussion how the action or inaction complained of has resulted

in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

We are an applicant for a gTLD under ICANN's new gTLD program. We have applied on the basis that .MUSIC is a "community" application as defined in the program. We have been denied community status in the Community Priority Evaluation and now have the opportunity to win the string at auction unless DotMusic Limited prevails in CPE. Approval of this applicant's Change Request has the effect of materially changing the application and giving it unfair advantage in the CPE process, which in turn will cause us material financial harm, as detailed above.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request.



Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

### **Terms and Conditions for Submission of Reconsideration Requests**

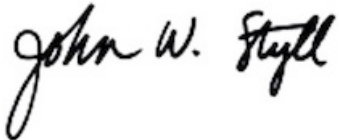
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



17 April 2015

Signature

Date