

ANNEX A

ICANN Re-Consideration Request filed by .MUSIC

Determinations

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/462/ICANN/79

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

(Consolidated with Cases No.

EXP/463/ICANN/80

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
DOT MUSIC LIMITED (GIBRALTAR)

and

EXP/467/ICANN/84

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs.
DOTMUSIC INC. (UAE)

and

EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
ENTERTAINMENT NAMES INC. (BRITISH VIRGIN ISLANDS)

and

EXP/477/ICANN/94

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
VICTOR CROSS, LLC (USA))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD opposed: .MUSIC

Nature of objection: Community

American Association of Independent Music (“A2IM”)

Objector

-v-

Charleston Road Registry Inc.

Applicant

Contact Information Redacted

The Applicant: Charleston Road Registry Inc.,
Contact Information Redacted

represented by Sarah Falvey of
Contact Information Redacted

Contact Information Redacted

Rosenman LLP,

Contact Information Redacted
Contact Information Redacted

and Brian Winterfeldt of Katten Muchin
Contact Information Redacted

Also to be copied: Contact Information
Redacted

The Objector: American Association of Independent Music (A2IM) of
Contact Information Redacted

Contact Information Redacted

represented by Constantine G. Roussos of DotMusic,
Contact Information Redacted

Contact Information Redacted

and Jason Schaeffer of ESQwire.com P.C.,

Contact Information Redacted

The Panel: The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL,
Contact Information Redacted

Contact Information
Redacted

appointed on 9th June 2013 and file

transferred to him on 12th August 2013 shortly after payment of all relevant fees.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-1680-18593). The Objection was lodged on 13th March 2013 and the Response on 22nd May 2013.

2. On 7th May 2013 the International Centre for Expertise of the ICC (“Centre”) consolidated this case with cases EXP/463/ICANN/80 (*A2IM v Dot Music Limited*), EXP/467/ICANN/84 (*A2IM v DotMusic Inc.*), EXP/470/ICANN/87 (*A2IM v Entertainment Names Inc.*) and EXP/477/ICANN/94 (*A2IM v Victor Cross, LLC*) because the applied for string, .music, and Objector were the same in all cases. The effect of consolidation is not to

make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

4. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

5. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 20th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

6. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 7th September 2013 the Applicant duly submitted an additional written statement dated 6th September 2013 with supporting exhibits.

7. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "The Rules", but where appropriate will identify the particular rule concerned.

8. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them all together as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and
- (2) The Objector must prove each of the four tests set out and elaborated in Art.3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

9. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful. If it is not then it will be for other procedures within ICANN to determine what happens next, I am not concerned with these.

Who the parties are and what they do or propose to do

The Applicant

10. The Applicant is a US company incorporated in Delaware but having its address in California at the headquarters of its parent company, Google Inc. In its Application it says:

In line with Google's general mission, Charleston Road Registry's mission is to help make information universally accessible and useful by extending the utility of the DNS while enhancing the performance, security, and stability of the Internet for users worldwide. Charleston Road Registry aspires to create unique web spaces where users can learn about products, services, and information in a targeted manner and in ways never before seen on the Internet. Its business objective is to manage Google's gTLD portfolio and Google's registry operator business. As discussed further in the responses to questions 23 and 31, Charleston Road Registry intends to outsource all critical registry functions to Google Registry Services.

The purpose of the proposed gTLD, .music, is to provide a dedicated domain space in which copyright holders and their authorized distributors and licensees can enact unique second-level domains that relate to the promotion, sampling, or purchase of music. Charleston Road Registry believes that registrants will find value in associating with this gTLD, in particular musicians and music distributorsThis mission will enhance consumer choice by providing new availability in the second-level domain space, creating new layers of organization on the Internet, and signalling the kind of content available in the domain.

And:

The goal of the proposed gTLD is to create a new Internet environment that provides registrants with the opportunity to associate with a meaningful term. Charleston Road Registry, as the registry operator, will define the specialized meaning of the term and, based on this definition, will identify criteria for registrants to operate in the proposed gTLD. Only entities that meet these criteria will be entitled to register for a domain in the gTLD. Specialization, therefore, arises from the Charleston Road Registry definition of a term, as well as through market dynamics as entities align their offering(s) with the term. This specialization will be maintained through intermittent

audits to ensure the relevancy of content in the proposed gTLD to the defined meaning of the gTLD.

The specialization goal of the proposed gTLD is to create a new Internet environment that provides registrants with the opportunity to associate with the term "music" and to provide content and offerings related to music and/or targeted at users seeking music content.

The Objector

11. The Objector is the American Association of Independent Music ("A2IM"). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry's market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others. And it has a general "mission statement" which includes passages such as:

Fair Trade

A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.

New Technology and Distribution

A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.

Access to Media

Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.

Legislative

A2IM will represent the Independent sector's interests in government and legislative issues.

A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules (specifically Rule 3.2.2.4 of the Guidebook) themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are

131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM's Objection is being conducted by Mr Constantinos Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communiqué of the GAC (Government Advisory Committee) to ICANN.

Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .music is one of them

18. What difference does this make? The GAC has not said that .music should not be allowed at all (as it has in the case of some other proposed gTLDs). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant says the Objector lacks standing. It concedes that “A2IM is arguably an *established institution*” so I need not consider that aspect of standing further. It makes what I think is a bad point: it is that because A2IM claims to represent “independent entities” it cannot be representative of them by reason of their very independence. But “independent” here is essentially a term of art – a record Label which is not a major – an “Indie”.

23. The Applicant bases its main attack as regards standing on the requirement that the Objector must be “associated with a clearly delineated community”.

24. So what the A2IM must show is that there is such a thing as a *music community*, that that community is *clearly delineated* and that A2IM is *associated with* it. The burden lies on the Objector in relation to all these points.

25. I would add that the first test for a successful opposition overlaps with the test for standing. For the first test requires that the “The community invoked by the objector is a

clearly delineated community” (Rule 3.5.4 of the Guidebook) and the requirement for standing is that the objector “has an ongoing relationship with a clearly delineated community (Rule 3.2.2.4).

A “music community?”

26. I am not at all clear what A2IM says the music community is. It refers to the “independent music community” meaning independent music labels, but that cannot possibly constitute a global music community as a whole. In other places it invokes all its members and associate members. But even if you took them all as being a “community” (which I do not) they could only form a part of the global citizenry (nearly all mankind) which has an interest of any sort in music. In its additional submission A2IM suggests that the community consists of its membership in the context of the clear delineation requirement. But A2IM’s membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind.

27. I do not think that there is anything which can fairly be described as a “music community”. There is a vast range of different types of music in the world. Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make a “community” – the word will not stretch that far. There is no cohesion or relationship between all those concerned with creating performing, recording or “consuming” music of all the different sorts known to mankind. There is no public recognition of such a thing as the “music community.” There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

“Clearly delineated”

28. Moreover such a formless supposed community cannot possibly be “clearly delineated.” The supposed community is formless. I repeat: there are no boundaries, formal or informal for it – how one says one person is within it and another without.

29. A2IM does not focus on “clear delineation” save in its Additional Submission. As I have said there it suggests delineation by virtue of membership of A2IM. True it is that membership or not provides a clear delineation of some sort, but it is not a clear delineation of those targeted by the proposed gTLD, not the right sort of “clear delineation.”

Is A2IM associated with the community?

30. And even if there were a “music community”, A2IM can hardly claim to be associated with it. Indeed I reject the implied suggestion that A2IM is representative of independent record labels as whole. Its members form a fraction of the Indies of the USA, still less that of the world. It does not have an ongoing relationship with anything more than its own members. That is not enough to constitute an ongoing relationship with a “music community.”

31. There are other problems with the suggested association. Firstly A2IM as such only has a relationship with its members. Only if it has the authority to act and speak for all its members in relation to .music could there be a wider association, even supposing an association between the A2IM’s members and the a “music community” were enough – which I do not think it is.

32. I elaborate. Firstly I do not think it is proved that the Objector speaks for all its Indie members in relation to the proposed .gTLD. Only a minor proportion of its members have been willing to write letters of support (the letters form Appendix H, although the Objection refers to exhibit A). As regards that minor proportion I am not satisfied that they have any real objection to this particular Application – none of the letters indicate much more than general concern about what might happen if there is a mismanaged .music gTLD which fails to control piracy. None of the letters indicate that the author has even read the Application form. It is not indeed clear that the authors are aware that A2IM is supporting (or tacitly supporting by not opposing) Mr Roussos’ company’s application.

33. Secondly at best the Objector’s Indie membership is only a minor proportion of American Indies, and a much more minor proportion of the Indies of the world and a still lesser proportion of the world’s record companies. This matters because I can see no difference between any concern an Indie company might have about .music and that which a major might have – they are all record companies interested in the suppression of copyright infringement. Viewed in that light the Objector’s members form a very minor proportion of the world’s record companies – not a significant proportion of those who stand in the same case, namely all the members of the global record industry. A2IM’s association with the world record industry (taking that to be the community for a moment) is limited indeed.

34. Thirdly A2IM's members are not themselves musicians of any kind at all. Its members doubtless have an interest in the commercial exploitation of the music of bands or groups signed to them, but A2IM's interest is only indirect. A2IM does not represent or even purport to represent musicians of any sort. There are no letters of support from any actual musicians – indeed musicians cannot be members of A2IM.

35. As to A2IM's associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM to speak for it in relation to any specific matter and specifically for this Objection. It is unthinkable, for instance, that A2IM have authority to speak for Apple (iTunes) or Spotify.

36. In these circumstances I conclude that it is not proved that there is such a thing a music community or that A2IM is "associated" with any musicians at all, still less with a "clearly delineated community" of them.

37. I therefore hold for all these reasons that A2IM lacks standing to make this Objection. The Applicant therefore prevails.

Further Observation

38. Even if that were wrong, I am satisfied that the Objector has failed to satisfy the detriment test, namely whether:

"the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."

39. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

40. I think the answer on the evidence is clearly no. I start with points which I have largely already gone into and merely list here:

- (1) It is not proved that the Objector speaks for all its Indie members.

- (2) Only a minor proportion of its members have been willing to write letters of support.
- (3) As regards that minor proportion I am not satisfied that have any real objection to this particular application;
- (4) The Objector's Indie membership is only a minor proportion of American Indies, and a much more minor proportion of the Indies of the world;
- (5) There is no reason to single out Indie record companies from majors – all record companies are concerned about piracy;
- (6) So the Objector's members form a very minor proportion of the world's record companies.

41. The absence of complaint by about .music from the world's record companies or their industry association is telling indeed. Evidently everyone else in the world apart from A2IM does not think there is a likelihood of a material detriment or they would surely have opposed.

42. Further, as I have said the Objector cannot be heard to say that any .music gTLD will cause a material detriment for it does not object to Mr Roussos' application. Its position in logic must be that his application would cause no detriment but this would. That it has not tried to do.

43. The Objection contains a long diatribe about alleged iniquities of Google in relation to copyright infringement, patent infringement and a host of other things. This is denied by the Applicant. Moreover the Applicant rightly points out that "Google is not gatekeeper for the internet." I do not propose to go into this more. For as the Applicant points out they have no bearing on the operation of the .music TLD. That will have to be in accordance with ICANN requirements – and indeed the Applicant intends to go further than these. It says:

1. CRR plans to require all participants in the gTLD to agree that they are authorized to offer any copyrighted content within the gTLD. Specifically, CRR plans to require registrars to include language in their registrar-registrant agreement that the registrant must be authorized or licensed to post any content that the registrant introduces into the gTLD. CRR will reserves the right to adopt enforcement measures, including a request that registrars facilitate a user reporting method to log complaints and/or potential instances of misuse within the gTLD. To mitigate trademark abuse, in addition to the requirements mandated by ICANN, CRR has committed to double the length of the mandatory Sunrise Period and to extend the Trademark Claims Service indefinitely. In conjunction with the recent expansion of the Claims Service to incorporate up to 50 previously abused strings per Trademark Clearinghouse

submission, CRR's "enhanced" Claims Service should significantly reduce rights holders' burdens by reducing monitoring costs and by deterring potential cybersquatters. CRR's commitment to engage in pre-registration verification of potential domain name registrants should further serve to reduce fraudulent practices and to facilitate better communication between the parties to a dispute.

2. CRR plans to implement additional comprehensive anti-abuse mechanisms, including:
 - 1) Protection against abusive registration of geographic names by reserving to the registry in order to prevent registration; and
 - 2) Initially reserving from registration by any party names with national or geographic significance within the TLD during the TLD's Sunrise Period and Trademark Claims Period.

44. It is not for me to gainsay that. No doubt ICANN will have remedies if the Applicant does not keep its promises. What I can say is that the "detriment" relied upon is far from made out.

Costs

45. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

46. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music's Objection is dismissed and the Applicant, Charleston Road Registry Inc., prevails.
2. Charleston Road Registry Inc. is entitled to refund of its advance payment of costs by the ICC pursuant to Art. 14(e) of the Procedure.

Date: ...18th February 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 *Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/474/ICANN/91

INTERNATIONAL FEDERATION OF ARTS COUNCILS AND
CULTURE AGENCIES

(AUSTRALIA)

vs/

.MUSIC LLC

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXP/474/ICANN/91

gTLD opposed: .music

Nature of objection: Community

International Federation of Art Councils and Culture Agencies (Australia)

Objector

-v-

.music, LLC (USA)

Applicant

The Parties and their Representation

The Applicant: .Music, LLC of
Contact Information Redacted
Karen J. Bernstein LLC,
Contact Information Redacted

Contact Information Redacted
represented by Karen Bernstein of Law Offices of
Contact Information Redacted

The Objector: International Federation of Arts Councils and Culture Agencies
("IFACCA") of
Contact Information Redacted
represented by Jason Schaeffer of ESQwire.com P.C.,
Contact Information Redacted
and Constantinos
Roussos,
Contact Information Redacted

Contact Information Redacted

The Panel

The Rt. Hon. Professor Sir Robin Jacob of the Faculty of Laws, UCL,
Contact Information Redacted
Contact Information Redacted, appointed on 19th June 2013,
file transmitted to me on 18th July 2013 shortly after the estimated costs were paid.

EXPERT DETERMINATION

General Procedural matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (Application ID 1-959-51046). The Objection was lodged on 13th March 2013 and the Response on 15th May 2013.
2. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find

a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

3. On 28th May 2013 the Objector requested leave to file additional submissions, including its Reply to the Response in advance of the Panel selection. By emailed attached letter of 10th July 2013 the Applicant objected to the additional submission and asked me to deny its admission. By letter of 22nd July 2013 the Objector responded to the letter of 10th July 2013.

4. By my interim decision of 30th July 2013, (itself unpublished but they are also to be found in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77), I ruled that I had power to admit the additional submissions and decided to do so on the basis that the Applicant should have liberty to submit a “Sur-Reply”. The Applicant did so on 12th August 2013.

5. The normal 45 day deadline for an expert determination (Art. 21 of the Procedure) would have expired on 1st September 2013. However I requested the Centre for an extension of time for two reasons. First is that I was also seized of a number of other community objections to the .music string and the somewhat allied .band string. For the sake of consistency it was obviously desirable that the decisions in all cases were rendered at the same time and these other cases were slightly lagging the present case. Secondly, although this was a lesser consideration, the time for my determinations fell within the holiday period.

6. After I had submitted my draft decision to the ICC, by an email of 11th October 2013, the Objector sought to introduce yet further fresh evidence consisting of a statement of the Applicant published by ICANN on 9th October 2011. The Objector claimed this showed a material change from the original Application and was said to be contrary to and inconsistent with submissions it had made in these proceedings. The Applicant responded by an email of 12th October saying there was no change still less a material change and the Objector replied by an email of 10th October.

7. Since I had already concluded that the Objector lacked standing and none of this material touched that point, it was and is irrelevant to the outcome of these proceedings I would add this: that having examined the material, I think it is

irrelevant to any of the other issues. It does not amount to any change as to the Rules which I have to apply (see below as to these). It was about whether or not the Applicant would operate an exclusive access registry to which the answer was “no”. That may or may not be relevant to ICANN’s ultimate decision, but is not relevant to whether or not the Objector has standing or has made out the grounds for a community objection.

8. The Rules I have referred to are the Rules for Expertise of the ICC (“ICC Rules”), supplemented by the ICC Practice Note on the Administration of Cases (“ICC Practice Note”) under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (“Procedure”) of the gTLD Applicant Guidebook (“Guidebook”). I collectively call these “the Rules” but where appropriate will identify the particular rule concerned.

9. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and
- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

The function of this Panel

10. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether the Applicant should be awarded the gTLD .music. My task is more limited: to decide whether the Objector concerned has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection will be successful. If they are not then it will fail. It will then be for other procedures within ICANN to determine what happens next. I am not concerned with these.

The Applicant

11. The applicant, .music LLC, is a US company incorporated in the State of Tennessee. Its parent company is called Far Further LLC. It has “partnered” with a company called Neustar Inc. which is an experienced TLD registry operator for the operation of its proposed .music registry. The application form indicates that Neustar is in a position to provide appropriate levels of security and the technical ability to achieve the applicant’s aims.

12. In its application .music LLC opens its description of its “Mission Purpose” as follows:

“The mission of .music is to collectively grow a domain that serves artists, songwriters and music professionals; promotes music and nurtures the art ... all for the love of music.”

More concretely the applicant says:

“Our goal is to work with members of the global music community to create a trusted, secure and restricted TLD for accredited members of the music community. The dotMusic Registry will provide qualifying registrants the opportunity to register their preferred domain name in a safe, reputable and globally accessible TLD. Registrants will be identified and validated as members of the music community through their existing and maintained membership in existing associations related to the creation and support of music.”

13. The general idea is that there should be a system of vetting applicants for a .music domain name. This would exclude IP infringers so that “The Internet user will know that they are dealing with a registrant that is identity-verified and compliant in their use and distribution of IP.” The aim is to create a domain name which will give users a “high expectation of trust and security.” The application form explains in general terms only how the vetting will work and what will happen if an abuse of the .music TLD is alleged. Largely the detail seems to be about trade mark infringement – rather less is said about copyright infringement though doubtless there is a proposed mechanism for dealing with an applicant for, or holder of, a .music address who is engaged in copyright infringement. So also for potential criminal activity such as child pornography.

14. For present purposes that is enough about the Applicant and its intentions – more detail can be found by referring to the open part of the Application on the ICANN website, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1388>.

15. The Applicant has a lot of support for its Application. This is evidenced by the bundles of letters forming Annexes 3 and 4 to the Response. True it is that some (but by no means all) of them are in common form. But the fact that the organisations concerned were prepared to provide support, and the fact that the organisations represent a range of different types of people interested in music (performers, composers, songwriters and record labels) shows it is a serious contender for .music.

The Objector

16. The Objector describes itself in the following way (I omit footnotes to the IFACCA website where a lot more about the Objector and its activities can be found):

“The International Federation of Arts Councils and Culture Agencies (IFACCA) is the global network of national arts funding agencies inaugurated in December 2000. Achievements since 2001 are described in IFACCA announcements and its anniversary publication First Five Years.

IFACCA is the worldwide network of national arts funding agencies dedicated to improving good practice in arts and cultural policy development, arts funding, audience development and public access to the arts such as music.

It aims to improve the capacity and effectiveness of government arts and music funding agencies to benefit society through networking, advocacy and research. Its Vision is “A world in which the arts are valued in themselves and for their contribution to strengthening communities and enriching lives.” Its Mission is “To improve the capacity and effectiveness of government arts funding agencies to benefit society through networking, advocacy and research.”

Objectives of the Federation are to:

- Support the leadership of government arts funding agencies with a well-informed, global perspective on issues affecting arts and cultural policy
- Consolidate the collective knowledge of government arts funding agencies
- Enhance cooperation and promote understanding between government arts funding agencies, and between them and other key international networks and organisations
- Promote the value of public investment in a diversity of arts and cultural practices
- Provide relevant, responsive and accountable services to members of the Federation

17. Thus the Objector is essentially, as it itself puts it in the Appendix to the Opposition, “the global network of arts councils and ministries of culture with national members from over 70 countries comprised of governments’ Ministries of Culture and Arts Councils covering all continents.” It also has links with other organisations such as UNESCO. Attention is drawn to a link with the International Association of Music Information Centres but it not clear what the significance of that is. Clearly IFACCA performs valuable work in helping its various members organise, get funding for and promote support for the arts. Its website gives a clear picture of these activities. None are directly related to the provision of art (in its widest sense including music) by IFACCA itself. It is not an art funder itself: its members do that.

Has the Objector got standing?

18. Of particular importance in relation to this question is that the Objector does not even purport to represent any of its members (still less any company or organisation with which it has a link) in relation to its Objection to the gTLD .music. On the contrary it explicitly states in the Appendix to its Objection:

Please note that while the dotMusic project has been given in-principle approval by the board of IFACCA, **it has not been endorsed by individual member organisations** (My emphasis).

19. It is not entirely clear what the “dotMusic project” is – IFACCA does not explain it as it could have done. The best inference is that it is for the IFACCA to support a rival applicant for .music. The Objection refers to “Other Related Entities”:

“DotMusic and Supporting Music Community Organisations (see Appendix A)” [There is no Appendix A but there is an Appendix H which I think must be the document referred to].

“DotMusic” appears to be the general name of this rival. Its moving spirit is Mr Constantinos Roussos, named as the Objector’s representative in this case. Such support would include eliminating a rival applicant. Thus pursuing this opposition must be part of the “dotMusic” project. Whether or not Mr Roussos or his companies are actually paying the IFACCA’s legal costs is not explicit – I note that the Applicant so asserts and it is not denied).

20. Whether IFACCA has standing must be judged by the Rules as they apply to the facts concerning IFACCA itself.

21. The Applicant argues against such standing. In summary its argument runs thus:

- (i) It accepts that the IFACCA is an “established institution”, having been founded in 2000 and been active ever since;
- (ii) But it is not “associated with a clearly delineated community,” namely the “music community” (assuming that there is such a thing).
- (iii) Nor does it have “an ongoing relationship with a clearly delineated community,” i.e. the music community.
- (iv) Its association is only with its members – the governmental arts bodies who form its members.

22. The Objector’s arguments in summary are:

- (i) There is a sufficient association between the IFACCA and the music community by reason of its association with its members;
- (ii) An association is also established another way, via DotMusic Limited’s membership of IFACCA.

23. Because of the Applicant’s concession that the IFACCA is an established institution, I need not consider this point further.

24. However the Applicant contends that the IFACCA does not have *an ongoing relationship with a “clearly delineated community”* within the meaning of the Rules (*specifically Rule 3.2.2.4 of the Guidebook*) It is not enough to have an ongoing relationship with a community of any sort – the relationship must be with *a significant portion of the community to which the gTLD string may be explicitly or implicitly be targeted*. I accept that construction of the Rules – it would make no sense for a party to have standing because it had a relationship with a community wholly unrelated to the string in question.

25. It follows that the IFACCA must prove an ongoing relationship with the music community (assuming for the moment that there is such a thing, a point itself in

contest). I do not think it has any such relationship. It is quite clear from the disclaimer referred to above that IFACCA has no representative capacity to act for others. Only its own relationships can count. These are only with its members and only in relation to the matters within its functions – essentially liaison and facilitation between government arts organisations. Some of these might have standing (I do not say do). But even if they did, the IFACCA cannot get its own standing by piggybacking from such members. It does not represent them in relation to this matter.

26. Still less do I consider it can gain standing because dotMusic Limited has become an associate member. Even if dotMusic Limited had standing (which I doubt not least because it is probably not an “established institution”), it is simply not the case that IFACCA represents it. As for the dotMusic Ltd.’s “Supporting Music Community Organizations”, they have no relationship whatever with the IFACCA. This is a hopeless attempt to piggyback on piggyback.

27. I have no hesitation in concluding that the IFACCA does not have standing to make this Objection as defined and required by the Rules. The Applicant therefore prevails.

Further Observations

28. That is enough to dispose of this case. Although I need not go on to consider whether the Objector has proved all four of the tests for a community objection I will do so because I am not satisfied that they are. In particular I hold that neither a *clearly delineated community* nor *substantial opposition within the community* are proved. Both of these are further, independent, reasons for rejecting this Objection.

29. Firstly there is the question of whether the community invoked by the Objector is “clearly delineated.” The Objector defines it this way:

The music community invoked is a strictly delineated, organized and culturally-based community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“COMMUNITY”), that relate to music: the art of combining sounds rhythmically, melodically or harmonically. “MUSIC” has no other significant meaning or name beyond the definition offered by popular dictionaries and encyclopaedias that define “MUSIC” as relating to “combining sounds rhythmically, melodically or harmonically (“UNIQUENESS”).” The music community corresponds to the

community relating to “the art of combining sounds rhythmically, melodically and harmonically” (“IDENTIFICATION”; “ASSOCIATION”). The Community is distinct and has a strong association with the applied for string since it encompasses sharing similar needs and attitudinal and behavioural patterns in relation to music-related activities, music production and its consumption. The “MUSIC” string matches the name of the Community and is the established name by which the Community is commonly known by others, such as the traditional media using phrases such as the “MUSIC” artists, “MUSIC” producers and “MUSIC” publishers to classify commonly known Music Community entity types (“NEXUS”; “ASSOCIATION”). Also the “MUSIC” string is commonly used in classification systems such as ISMN, ISRC, ISWC, ISNI and Dewey. For example, the Dewey Decimal Classification system, published in 1876 (“LONGEVITY”; “PRE-EXISTING”; “ASSOCIATION”), has code 780 relating to “MUSIC”.

30. This cloud of words does not convey to me anything which can fairly be described as a clearly delineated community. Who is within it and who without? What is the test? Almost everyone (save perhaps the completely deaf or tone deaf – and even Beethoven became deaf)) appreciates music of one sort or another. Many make it, from chanting monks to West Indian calypso bands. Others write it – from advanced polyphonic music to dance music. But that does not put them all into the same box. The same generic word covers all music. But a common generic word does not itself evidence anything which can fairly be called a “community” even in the widest sense of that word. There is no public recognition of a music community locally or globally, there are no formal or informal boundaries around the supposed “community.”

31. Next there is the question of whether there is substantial opposition within the community. If the community is all who are interested in music (making, listening, commercially exploiting and so on), then those who express support for the Objector are a tiny proportion of that community – because the community is effectively humankind. But even if one considers just those whom the Objector claims to represent, no substantial opposition is demonstrated. Only a few of its 70 members have supported this Objection. On any basis substantial opposition is not proved.

Costs

32. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as

determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

33. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The International Federation of Art Councils and Culture Agencies' Objection is dismissed and the Applicant, .Music, LLC, prevails.
2. The Applicant, .Music, LLC, is entitled to a refund of its advance payment of costs by the ICC pursuant to Art. 14(e) of the Procedure.

Date: ...18th.. Feb 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob
Expert

Annex A
The Applicable Rules for Community Objections
gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

“An established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below:

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/463/ICANN/80

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

DOT MUSIC LIMITED

(GIBRALTAR)

(Consolidated with Cases No.

CASE No. EXP/462/ICANN/79

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
CHARLESTON ROAD REGISTRY INC. (USA)

and

EXP/467/ICANN/84

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs.
DOTMUSIC INC. (UAE)

and

EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
ENTERTAINMENT NAMES INC. (BRITISH VIRGIN ISLANDS)

and

EXP/477/ICANN/94

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
VICTOR CROSS, LLC (USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD in issue: .MUSIC

Nature of Objection: Community

American Association of Independent Music (“A2IM”)

Objector

-v-

dot Music Limited

Applicant

The Parties and their Representation

The Applicant: dot Music Limited of **Contact Information Redacted**
Contact Information Redacted

represented by Peter Young of Famous Four Media Ltd., **Contact Information Redacted**
Contact Information Redacted

The Objector: American Association of Independent Music (A2IM) of **Contact Information Redacted**
Contact Information Redacted

represented by Constantinos Roussos of DotMusic, **Contact Information Redacted**
Contact Information Redacted and Jason Schaeffer of ESQwire.com
P.C., **Contact Information Redacted**

The Panel: The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, **Contact Information Redacted**
Contact Information Redacted appointed on 19th June 2013, files transferred to me on 12th August 2013 shortly after payment of the relevant fees. **Contact Information Redacted**

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-1175-68062). The Objection was lodged on 13th March 2013 and the Response on 5th June 2013.

2. On 7th May 2013 the International Centre for Expertise of the ICC (“Centre”) consolidated this case with cases EXP/462//ICANN/79 (*A2IM v Charleston Road Registry Inc.*), EXP/467/ICANN/84 (*A2IM v DotMusic Inc.*), EXP/470/ICANN/87 (*A2IM v Entertainment Names Inc.*) and EXP/477/ICANN/94 (*A2IM v Victor Cross, LLC*) because the

applied for string, .music, and Objector were the same in all cases. The effect of consolidation is not to make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

4. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 16th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here.

5. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77), to admit it on the facts of this case and to allow the Applicant a right of response. On 6th September 2013 the Applicant duly submitted an additional written Sur-Response on 6th September 2013 with supporting Annexes.

6. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

7. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and
- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

8. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful. If not then it will be for other procedures within ICANN to determine what happens. I am not concerned with these.

Who the parties are and do or propose to do

The Applicant

9. In its Response the Applicant says:

“The Applicant, dot Music Limited is a Gibraltar private limited company, the shares of which are partially owned by Domain Venture Partners PCC Limited, a Gibraltar Experienced Investor Fund regulated by the Financial Services Commission of Gibraltar. .MUSIC gTLD is intended and designed to increase availability and access to create, produce and disseminate informative, creative and innovative music-related content. Its framework and mechanisms have been established to ensure the gTLD operates and grows in a manner that is responsible, protects consumers and promotes consumer and industry trust and confidence. The Applicant envisions it will work closely with key global music stakeholders to further develop policies and best practices to ensure successful operation of the gTLD”.

10. In its application form the Applicant says:

“The Applicant’s mission and purpose is to create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more targeted, secure and stable environment. Its aim is to become the premier online destination for such creators and their wide range of users. The Applicant will create an Internet space whose central function is to provide a platform for creating, producing and disseminating informative, creative and innovative content that is easily recognizable as pertaining to its stakeholder group. The Applicant is acutely aware of the importance of ICANN’s mission in coordinating the global Internet’s systems of unique identifiers and ensuring their secure and stable operation. The Applicant’s core focus is to create a secure, sustainable, and specialized gTLD, thus supporting ICANN’s primary goals for this program in promoting consumer trust, consumer choice, competition and innovation. Why .music? Music brings people together and can command devotion seldom seen elsewhere. It can excite people of any age and can be hugely emotionally charged, touching the depths of our innermost feelings. Music lends itself to countless

emotions; happiness, pride, anger, sorrow – all of them passionate. Such passion needs an outlet, and it will find it in .music.

Since its inception the internet has revolutionized the way we communicate, empowered hundreds of millions with knowledge and created a platform where global commerce can thrive. However, access to the countless benefits and opportunities which the internet offers can often be hindered when navigating the ever-expanding sea of irrelevant and sometimes malicious content which also exists.

Thus, the aim of .music is to create a blank canvas for the online music sector set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space for music. As the new space is dedicated to those within this affinity group the Applicant will ensure that consumer trust is promoted. Consequently consumer choice will be augmented as there will be a ready marketplace specifically for music-related enterprises to provide their goods and services. All stakeholders within the sector will be able to sample reactions to new ideas, or gather thoughts on the improvements of established ones. This will drive innovation and competition within the music sector as there will be new channels available not yet fulfilled by current market offerings. This new environment will cause registrants to seek new and varied ways to separate themselves from the competition.”

The Objector

11. The Objector is the American Association of Independent Music (“A2IM”). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which

include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others. And it has a general “mission statement” which includes passages such as:

Fair Trade

A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.

New Technology and Distribution

A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.

Access to Media

Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.

Legislative

A2IM will represent the Independent sector’s interests in government and legislative issues.

A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules (specifically Rule 3.2.2.4 of the Guidebook) themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which

has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM’s Objection is being conducted by Mr Constantinos Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communique of the GAC (Government Advisory Committee) to ICANN:

“Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .music is one of them.

18. What difference does this make to this case? The GAC has not said that .music should not be allowed at all (as it has in the case of some other proposed strings). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant says the Objector lacks standing. It makes no formal concession that that “A2IM is an *established institution*” (Rule 2.2.2.4 of the Guidebook) but on the other hand does not expressly and distinctly challenge that aspect of the requirement of standing. I take it to be tacitly conceded and so I need not consider that aspect of standing further.

23. The Applicant bases its main attack as regards standing on the requirement that the Objector must have an *ongoing relationship* with a *clearly delineated community*. That

community must be “a community strongly associated with the applied-for gTLD”. This part of the standing requirement is linked with the first test which must be proved by one who has standing. For in my view these two subjects are interrelated. To have standing a party must be an “established institution associated with a clearly delineated community”. And the first test which must be passed for one who has standing is whether “The community invoked by the objector is a clearly delineated community.”

24. So what the Objector must show is that there is a music community and that it is strongly associated with that community. And the burden lies on the Objector.

25. Firstly I do not think that there is anything which can fairly be described as a “music community”. There is a vast range of different types of music in the world. Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make a “community” – the word will not stretch that far. There is no public recognition of such a thing as the “music community.” There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

26. And even if it there were a “music community”, A2IM can hardly claim to be strongly associated with that community. Indeed A2IM cannot even claim to be representative of independent record labels as whole. Its members form a fraction of the Indies of the USA, that is all. When judged from a global perspective A2IM cannot even be regarded as representative of the Indies of the world, still less of “record companies” as a whole.

27. Moreover A2IM’s members are not themselves musicians of any kind at all. Its members doubtless have an interest in the commercial exploitation of the music of bands or groups signed to them, but A2IM’s interest is only indirect. A2IM does not represent or even purport to represent musicians of any sort. Although it exhibits letters of support (the letters form Appendix H, although the Objection refers to exhibit A) from some (a minor proportion) of its members, there are none at all from any actual musicians – indeed musicians cannot be members of A2IM. It is not shown (e.g. by reference to a constitution) that A2IM even has authority to speak for its members in relation to this dispute, still less for the musicians connected with its members.

28. As to A2IM’s associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM to speak for it in relation to any specific matter and specifically for

this Objection. It is unthinkable, for instance, that A2IM have authority to speak for Apple (iTunes) or Spotify.

29. Moreover there is simply no evidence of any relationship, ongoing or otherwise, between A2IM and anything which might be described (if it were possible – which I do not think it is) as a music community.

30. In these circumstances I conclude that it is not proved that there is such a thing a music community or that A2IM is “associated” with any such thing supposing it existed.

31. I therefore hold that A2IM lacks standing to make this Objection. The Applicant therefore prevails.

Further Observation

32. Even if that were wrong, I am satisfied that the Objector has failed to satisfy the detriment test, namely whether:

“the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

33. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

34. I think the answer on the evidence is clearly no. Firstly as I have said I do not think it is proved that the Objector speaks for all its Indie members. Secondly only a minor proportion of its members have been willing to write letters of support. Thirdly as regards that minor proportion I am not satisfied that have any real objection to this particular objection – none of the letters indicate much more than general concern about what might happen if there is mismanaged .music gTLD. None of the letters indicate that the author has even read the Application form. It is not indeed clear that the authors are aware that A2IM is supporting (or tacitly supporting by not opposing) Mr Roussos’ application. Fourthly at best the Objector’s Indie membership is only a minor proportion of American Indies, and a much more minor proportion of the Indies of the world. Fifthly, I can see no real difference between any concern an Indie company might have about .music and that which a major

might have – they are all record companies interested in the suppression of copyright infringement. Viewed in that light the Objector’s members form a very minor proportion of the world’s record companies – not a significant proportion of those who stand in the same case, namely all the members of the global record industry.

35. And on the question of detriment the case is woefully weak. As I have said the Objector cannot be heard to say that any .music gTLD will cause a material detriment for it does not object to Mr Roussos’ company’s application. What it would have to show is how that application would cause no detriment but this would. That it has not tried to do.

Costs

36. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

37. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music’s Objection is dismissed and the Applicant, dot Music Limited, prevails.
2. dot Music Limited is entitled to refund of its advance payment of costs by the ICC pursuant to Art. 14(e) of the Procedure.

Date: ...18th February 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 *Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/467/ICANN/84

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs.

DOTMUSIC INC.

(UAE)

(Consolidated with Cases No.

CASE No. EXP/462/ICANN/79

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
CHARLESTON ROAD REGISTRY INC. (USA)

and

EXP/463/ICANN/80

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
DOT MUSIC LIMITED (GIBRALTAR)

and

EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
ENTERTAINMENT NAMES INC. (BRITISH VIRGIN ISLANDS)

and

EXP/477/ICANN/94

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
VICTOR CROSS, LLC (USA))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD in issue: .MUSIC

Nature of Objection: Community

American Association of Independent Music (“A2IM”)

Objector

-v-

DotMusic Inc.

Applicant

The Parties and their Representation

The Objector: American Association of Independent Music (“A2IM”) of Contact Information Redacted
Contact Information Redacted

represented by Constantinos Roussos of DotMusic, Contact Information Redacted
Contact Information Redacted and Jason Schaeffer of ESQwire.com
P.C., Contact Information Redacted

The Applicant: DotMusic Inc. Contact Information Redacted
Contact Information Redacted

represented by Brijesh Harish Joshi of Contact Information Redacted
Contact Information Redacted

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, Contact Information Redacted
Contact Information Redacted appointed on 19th June 2013, files transferred to
me on 12th August 2013 shortly after all relevant fees paid.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-1058-25065). The Objection was lodged on 13th March 2013 and the Response on 5th June 2013.
2. On 7th May 2013 the International Centre for Expertise of the ICC (“Centre”) consolidated this case with cases EXP/462/ICANN/79 (*A2IM v Charleston Road Registry*)

Inc.), EXP/463/ICANN/80 (*A2IM v Dot Music Limited*), EXP/470/ICANN/87 (*A2IM v Entertainment Names Inc.*) and EXP/477/ICANN/94 (*A2IM v Victor Cross, LLC*) because the applied for string, .music, and Objector were the same in all cases. The effect of consolidation is not to make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

4. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 19th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

5. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 7th September 2013 the Applicant duly submitted an additional written statement on 6th September 2013 with supporting exhibits.

6. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

7. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

8. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful in the case concerned. If they are not then it will be for other procedures within ICANN to determine what happens. I am not concerned with these.

Who the parties are and what they do or propose to do

The Applicant

9. The Applicant is a UAE company. In its application it says:

The Mission of .Music is to serve as the online home for the Music Industry and all associated entities. As an industry, music has always been dependent on the distribution methods and how it reached its audiences. It has undergone a rapid transformation with the ushering in of the digital age and the internet. The Internet is now an effective medium of selling music, and it has created closer relationships between the Industry and their audiences. In today's digital age, the industry has turned to the internet as its primary medium of choice, and .Music will further this association.

While it is primarily meant to cater to the needs of everyone associated with the Music industry - Musicians, Bands & Record Labels .Music will also serve entities at the periphery of the industry venues, DJs and other professionals that provide Music entertainment. .Music is also for Music lovers and audiences all over the world. There are streaming sites, music aggregators, online radios, music blogs etc., which cater to audiences worldwide who listen to Music.

Also, based on our analysis of the ComNet zone file, there are over half a million domain names with the word "Music" in them. We believe there is a need for a dedicated space which will cater to this transforming Industry's growing online dependence for representation, promotion and sustenance. .Music will serve this purpose. We see .Music becoming every Artist and Record Labels default choice to represent their business and interact with their fans. No other gTLD existing today, satisfies this requirement.

The digital era has really transformed business models in this industry. Digital channels now account for 29 per cent of global music industry revenues.(^2). These

channels primarily consist of online sales of albums, (digital and physical), subscription services, paid downloads etc.

But, there is no doubt that sudden move to digitization of content has come at a price. Internet piracy, due to ineffective intellectual property protection, has been rampant across all existing tlds.

Lost revenue through piracy has led to an overall decline in jobs. Based on data from the US Dept. of Labor, the industry employs 20% less people than it did in 1999. Protection of intellectual property rights within .music, will be one of our key objectives. We have drawn out policies which will go above and beyond ICANN requirements and aim to keep the space clear of illegitimate use.

.Music aims to be the perfect marriage between man's oldest passion - Music, and his latest obsession, the Internet.

In summary, the .Music Registry also aims to:

1.1 ENHANCE SEARCHABILITY AND RECOGNITION

To create a namespace that enables the music industry to distinguish themselves from countless others. This benefits the Registrants as well as the end users. End users will be able to find music related content easily amongst the sea of other sites.

1.2 ENHANCE REGISTRANT CHOICE

To create a namespace that provides the music industry greater choice to represent their brand online in the manner they please. Due to the saturated nature of the existing gTLD space many have to opt for a name that does not best reflect their brand.

1.3 CREATE A CLEANER INTERNET SPACE

To create a cleaner internet experience for end users by implementing pioneering registration policies, content and usage policies, and abuse mitigation processes.

1.4 CREATE A STABLE AND RESILIENT INTERNET SPACE

To deliver a stable and resilient internet experience to registrants and end-users by going above and beyond the ICANN mandated SLAs and delivering 100% resolution uptime.

The Objector

10. The Objector is the American Association of Independent Music ("A2IM"). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

11. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

12. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others. And it has a general “mission statement” which includes passages such as:

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A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.

New Technology and Distribution

A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.

Access to Media

Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.

Legislative

A2IM will represent the Independent sector's interests in government and legislative issues.

A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice".

13. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules (Guidebook rule 3.2.2.4) themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is "the presence of a formal charter, or national or international registration".

14. Moreover as the Applicant points out the Objector is itself a very small organisation, having limited assets and just four employees.

15. A2IM has two sorts of member: "Labels" and "Associate Members". Labels are what in the pre-digital world were called "record companies". They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called "Indies", that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that "work with, rely upon, or otherwise support independent labels". There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM's Objection is being conducted by Mr Constantinos Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communique of the GAC (Government Advisory Committee) to ICANN:

“Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .music is one of them.

18. What difference does this make to this case? The GAC has not said that .music should not be allowed at all (as it has in the case of some other strings). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant contends that the Objector has failed to prove any aspect of the standing requirement, namely that an Objector must be “an established institution associated with a clearly delineated community.” It says that the Objector is not an *established institution*, that there is no such thing as a *clearly delineated* music community and if there is the Objector is not associated with it.

23. I would add that the first test for a successful opposition overlaps with the test for standing. For the first test requires that the “community invoked by the objector is a clearly delineated community.”

Is A2IM an established institution?

24. In considering whether an institution is established rule 3.2.2.4 of the Guidebook provides the following guidance:

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

25. A2IM has been in existence since 2005. It was not formed as having anything to do with domain names but to act as an industry association for small American record companies. The Objector submits that it is not “a robust global institution, but rather a single part-time recording industry executive serving a small portion of industry in the US” and that that is not good enough to qualify as an established institution.

26. Although its membership (I here exclude associate membership) is essentially American and does not even consist of the majority American Indie labels, to my mind A2IM is, on balance, to be regarded as established. There is no reason to suppose its existence is precarious despite its small size; its voice is clearly at least listened to by at least the US Government and policymakers in the US. The US market is important globally and it would be fanciful to hold that A2IM has no recognition whatever outside the US.

A music community?

27. The Applicant says there is no such thing. I accept that submission. There is a vast range of different types of music in the world. Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make all mankind into a “music community” – the word will not stretch that far. There is no cohesion or relationship between all those concerned with creating performing, recording or “consuming” music of all the different sorts known to mankind. There is no public recognition of such a thing as the “music community.” There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

28. I am not at all clear what A2IM says the music community is. It refers to the “independent music community” meaning independent music labels, but that cannot possibly constitute a global music community as a whole. In other places it invokes all its members and associate members. But even if you took them all as being a “community” (which I do not) they could only form a part of the global citizenry (nearly all mankind) which has an interest of any sort in music of any sort. In its additional submission A2IM suggests that the community consists of its membership in the context of the clear delineation requirement. But A2IM’s membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind.

“Clearly delineated”

29. As for a music community which is “clearly delineated” the Objector is in an even worse position. The supposed community is formless – there are no boundaries, formal or informal for it – how one says one person is within it and another without.

30. A2IM does not focus on “clear delineation” save in its additional submission. As I have said there it suggests delineation by virtue of membership of A2IM. True it is that

membership or not provides a clear delineation of some sort, but it is not a clear delineation of those targeted by the proposed gTLD, not the right sort of “clear delineation.”

Association

31. The only direct association A2IM has is with its members. It invokes an association (which has to be an “ongoing”) with a clearly delineated community via its members and associate members – in short it claims association in a representative capacity. It says its members have the necessary association and it can invoke that association because it represents its members and acts as their agent or spokesman.

32. That raises the question of to what extent A2IM has authority to represent its members, either full or associate, and in relation to what. Only if it has their authority to speak for them in relation to this dispute can it invoke the relationships its members may have with the target of the proposed gTLD.

33. I do not think it is proved that it has any such authority. I have drawn attention to the absence of any formal document setting out A2IM’s general authority. The fact that it has spoken in relation to some other matters (as recounted on its website) does not cloak it with authority to speak for all its membership about all matters. I cannot infer from what it has done that A2IM has authority to speak for all its members in relation to gTLDs.

34. Indeed there is evidence pointing the other way: for A2IM sought support from its members. Only a minor proportion of these were willing to write letters of support (the letters form Appendix H, although the Objection refers to exhibit A). And as regards that minor proportion I am not satisfied that any of the authors have any real objection to this particular objection – none of the letters indicate much more than general concern about what might happen if there is a mismanaged .music gTLD. None of the letters indicate that the author has even read the Application form.

35. As to A2IM’s associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM authority to speak for it in relation to any specific matter and specifically for this Objection. It is unthinkable, for instance, that A2IM has authority to speak for major corporations such as Apple (iTunes) or Spotify about anything.

36. I conclude that A2IM does not have any sufficient association with the invoked community, even if that be Indies or its own members, still less with the record industry as a whole and even less with the targeted “community”.

37. I therefore hold that A2IM lacks standing for all the above reasons. The Applicant therefore prevails.

Further Observation

38. Even if that were wrong, I am satisfied that the Objector has failed to prove the detriment test, namely whether:

“the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Significant portion

39. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

40. I think the answer on the evidence is clearly no. As the Applicant observes there is “Inadequate opposition even with A2IM.” Only 18 label members (out of 210 in all) wrote supporting letters – 8.5%. I have no idea how big these companies are. Numerically they are of course a much smaller proportion of the world Indie population and still less of the world record company industry. They do not amount to a significant portion of the community targeted.

Material detriment

41. As I have said I am not satisfied even those who wrote in support demonstrate any real objection to this particular application or indicate why it would cause them material detriment. It is not indeed clear that that the authors are aware that A2IM is supporting (or tacitly supporting by not opposing) Mr Roussos’ application.

42. The gist of the letters of support is that if .gTLD is not well managed or has no proper controls it may attract applicants who act illegally and in particular infringe or facilitate

infringement of copyright. The Applicant clearly disavows allowing this (see its application). And if this fear were really well founded the entire world record industry would be up in arms – majors and Indies alike have a common interest in the suppression of piracy. The absence of a universal clamour makes it clear to me that the record industry as a whole does not fear material detriment. Its likelihood is not proved – a further reason for dismissing this Objection.

Costs

43. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

44. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music's Objection is dismissed and the Applicant DotMusic Inc. prevails.
2. DotMusic Inc. is entitled to a refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date: ...18th February 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)
(USA)

vs/

ENTERTAINMENT NAMES INC.
(BRITISH VIRGIN ISLANDS)

(Consolidated with Cases No.

CASE No. EXP/462/ICANN/79

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
CHARLESTON ROAD REGISTRY INC. (USA)

and

EXP/463/ICANN/80

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
DOT MUSIC LIMITED (GIBRALTAR)

and

EXP/467/ICANN/84

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs.
DOTMUSIC INC. (UAE)

and

EXP/477/ICANN/94

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
VICTOR CROSS, LLC (USA))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD in issue: .MUSIC

Nature of Objection: Community

American Association of Independent Music (“A2IM”)

Objector

-v-

Entertainment Names Inc.

Applicant

The Parties and their Representation

The Objector: American Association of Independent Music (A2IM) of Contact Information Redacted
Contact Information Redacted

represented by Constantinos Roussos of DotMusic, Contact Information Redacted
Contact Information Redacted and Jason Schaeffer of ESQwire.com P.C.,
Contact Information Redacted

The Applicant: Entertainment Names Inc. of Contact Information Redacted
Contact Information Redacted

represented by Reg Levy of Minds + Machine, Contact Information Redacted
Contact Information Redacted

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, Contact Information Redacted
Contact Information Redacted appointed on 19th June 2013, file transferred to
me on 12th August 2013 shortly after payment of relevant fees.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-994-99764). The Objection was lodged on 13th March 2013 and the Response on 22nd May 2013.
2. On 7th May 2013 the International Centre for Expertise of the ICC (“Centre”) consolidated this case with cases EXP/462//ICANN/79 (*A2IM v Charleston Road Registry Inc.*), EXP/463/ICANN/80 (*A2IM v Dot Music Limited*), EXP/467/ICANN/84 (*A2IM v DotMusic Inc.*) and EXP/477/ICANN/94 (*A2IM v Victor Cross, LLC*) because the applied for

string, .music, and Objector were the same in all cases. The effect of consolidation is not to make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

4. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 16th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

5. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 6th September 2013 the Applicant duly submitted a "Sur-Reply" with supporting annexes.

6. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook. I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

7. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

8. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful in the case concerned. If not then it will be for other procedures within ICANN to determine what happens. I am not concerned with these.

Who the parties are and what they do or propose to do

The Applicant

9. The Applicant is a BVI corporation. It does not state in its answer to questions in the Application form that it is either a subsidiary company or has a joint venture partner. The Response is submitted by a company called Top Level Domain Holdings Limited (“TLDH”). Footnote 116 of the Objection refers to a webpage which indicates that this company is the parent company of “Minds + Machines” which is named as the Applicant’s Representative. It seems safe to assume therefore that the Response is filed with the Applicant’s authority and all the more so since the Objector does not question that. It also seems that TLDH will provide the technical services for the Applicant.

10. In its Application the Applicant says (I apologise for length but it is not easy to summarise):

Background

Music has a central importance to practically every person on earth. Every culture has its own form, its own style and it is a fundamental part of human communication and development.

The word “music” however, while it defines this universally human creation, has a far narrower utility when applied to the Internet. The word “music” is a functional link between consumers, creators and the businesses that support them. Consumers seek out songs, creators seek out their audience and businesses seek out their customers and the word music plays a central role in this process of discovery and commerce. In addition to this music has fueled the growth of consumer products and online

businesses through association and as content for the products they sell.

Every country that is connected to the Internet will have a music business with individuals able to consume music in a variety of ways including passive listening, on demand streaming, downloading (illegal and legal) and ecommerce. This process of engagement is ever evolving with new participants appearing constantly. Traditional trade and consumer groups have found it difficult to control the flow of content and there has therefore arisen a tension between owners of music intellectual property, consumers and the technology businesses that enable this flow.

Central to this is the fact that there is little organization of the data that drives publication and distribution of music content. We believe that because at present there is no specific TLD for music it is difficult for artists to be consistently recognized and their music and trademarks to be properly safeguarded. While social media such as MySpace and Facebook have primarily played this role the actual identifier that links the artist or business to their association with music and the websites that represent them is often awkward, confusing, inaccurate and for consumers not trustworthy.

The .MUSIC TLD will offer to this group of creators, businesses and organizations an important identifier that can help serve to offer a safe, trustworthy, legitimate, consistent and universally recognizable anchor point for their music related activities. From a competitive perspective this group of potential registrants has little choice beyond social media URLs such as MYSpace.COM/BANDNAME or BANDNAMETHEBAND.COM or BANDNAMEMUSIC.COM. In addition, music fans whose passion extends to wanting to identify with their love of music via a website or email address will want to have the .MUSIC TLD to show their commitment to music. At present there is no compelling way on the Internet to do this.

We hope to provide .MUSIC names to artists, record labels, publishers, major brands and music fans. Considering the existing competition from simple Google search, Facebook, MySpace, Bandcamp and others we believe that we can safely achieve 50,000 registrants for the .MUSIC TLD in by year 2.

Purpose

The purpose of the .MUSIC TLD is to:

- * Provide a trusted TLD for musical artists, trade and union organizations, record labels, publishing companies, music distribution and marketing companies, DSPs, consumer brands, and music fans that will bring security, convenience, trust and efficiency to their music related activities.
- * Provide a trusted and convenient identifier for artists and businesses that will enhance consumers ability to discover and legitimately consume music through e-commerce and broadcast platforms.
- * Provide a mechanism whereby artists intellectual property will have a higher level of protection whereby industry professionals with a long history of defending music owners rights will be managing the distribution of the .MUSIC TLD.

* Provide a more organized means for the commercial consumption and distribution of music by way of a .MUSIC identifier.

* Provide the above mentioned groups with a compelling new choice for a domain name identifier at a competitive price.

* Provide music fans with the chance to personally identify with music on the Internet.

Our Mission is:

* To promote the legitimate and efficient exchange and consumption of music by making the domain names ending in .MUSIC available to all who may want to use .MUSIC domain names for their own artistic, commercial, business or personal or other legal purposes.

* To help safeguard the legal consumption and distribution of music and to give consumers safe and legitimate means for music discovery.

* To promote the music industry in general by having information of any and all types and for any and all legal purposes available and disseminated from websites and email addresses ending in .MUSIC for the registrants and users own purposes worldwide.

* To give to artists and the businesses that support them the tools to promote their brands through an easily identifiable website name and email address ending in .MUSIC.

* To give to global and local consumer brands the tools to promote their brand's association with music through an easily identifiable website name and email address ending in .MUSIC.

* To increase the choice that is offered to artists and businesses in how they market their music and brands and protect their intellectual property.

* To give music licensing and collection businesses additional tools to help maximize the rightful collection and distribution of royalties to artists through a more consistent mechanism for identifying artists and their performances.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

A .MUSIC domain will help local and international MUSIC performers, composers and enthusiasts to associate themselves with music. Also, because music is such a popular human art, a .MUSIC top-level domain will increase sales and visibility which [this sentence is not completed in the original]

PUBLIC BENEFIT

We believe that the Internet-using world will benefit from the existence of a .MUSIC gTLD by:

- making domain names ending in .MUSIC available to all those who may want to use such .MUSIC domain names for their own business, personal, political or other legal purposes in the United States and world-wide.
- the promotion of music by having information of any and all types and for any and all legal purposes available and disseminated from websites and email addresses ending in .MUSIC for the registrants' and users' own purposes world-wide.
- the promotion of MUSIC by allowing businesses, not-for-profits and individuals to associate their products, services, information and selves with MUSIC for their own purposes.
- allowing people and organizations to promote their association with music on the Internet.
- providing an identifiable means for people, organizations and businesses to communicate with those who associate with or provide music.

EXPANDING THE TLD NAMESPACE

Over the past decade, the market for domain name registrations has grown at a tremendous pace. From 2000 to 2010 domain name registrations increased from 40 million to 200 million domain names registered globally. 2011 experienced a growth of approximately 9%, which was significantly higher than the previous year's 6% growth, ending third quarter 2011 with approximately 220 million domain names registered globally. Approximately 60% of these are gTLDs, while the remaining 40% are comprised of ccTLDs. More specifically, gTLD growth was approximately 8% in 2011, while ccTLD growth exceeded 11%.

Existing TLDs, such as .COM and .NET, do not provide adequate solutions for many registrants. Domain names that relate to the registrants' business, interests, or associations are often already registered, priced exorbitantly high, or available options are unsuitable. Additionally, other options, such as ccTLDs, do not provide adequate alternatives as a registrant may not have any geographic relation or meet the criteria associated with other gTLDs such as .MUSEUM or .AERO. Therefore, the only available opportunity to pursue a relevant and useful domain name registration may be through a brand new registration of a gTLD.

Taking into account the new opportunities available with new gTLDs, growth is expected to continue in all sections of the domain name industry. It will benefit registrants and users by allowing registrants to reach more targeted audiences and increase their web presence. Additionally, it will allow registrants to more closely identify with a particular market segment.

At present, there is no specific .MUSIC domain name, or useful top-level alternative domain name, that exists for the people, organizations or businesses that associate themselves with music or people, organizations or businesses that want to

communicate with them. Those desirous of a domain name that indicates some level of association with music could seek a second level domain name such as "MUSIC.COM," "MUSIC.US" or "MUSIC.NET," but such domains (or similar names) are not readily available under the limited number of existing gTLDs, and--more importantly--only provide a secondary (at best) or weak (at worst) relationship between the domain name and MUSIC, which we believe is the primary goal of the registrant of such names.

From a competitive perspective, registrants that want a domain name that effectively and efficiently shows an association with music or registrants that want a domain name that allows them to identifiably communicate with people who associate or identify with it face a domain name marketplace that provides them with few, if any, options for their purposes. The .MUSIC top-level domain will resolve this problem by providing registrants with an efficient, effective, prominent, instantly understood way of showing their association with music, and provide those registrants who desire it a domain that that can effectively communicate information to such Internet users in an identifiable way. At the same time, .MUSIC provides competition with the existing TLDs and new gTLDs that will be approved by ICANN, benefiting the Internet community at large by increasing consumer choice.

We believe that the .MUSIC top-level domain will add significantly to competition and differentiation in the top-level domain space, both for registrants and Internet consumers. With respect to competition, registrants are presently extremely limited in their choice of domain names that allow them to efficiently and effectively associate themselves with music. The availability of useful, effective, straight-forward domain names on existing top-level domains, such as .COM, .NET and .ORG, are few and far between, or may be for sale at prices that are out of reach for most. .MUSIC will allow registrants to obtain useful, effective, straight-forward domain names rather than be forced to purchase, for example, their fifth, sixth or even later choice .COM or .NET name--which may well barely relate to the registrant's purpose--or use of a domain name that may be confusingly similar with numerous other .COM or .NET domain names. In addition, some existing generic top-level domain names, though newer, such as .XXX, may be inappropriate for most registrants for content associational reasons, while country-code top-level domains, though numerous, are not useful or appropriate for many registrants for geographical associational reasons. Thus, .MUSIC will increase competition for registrants who want a domain name that clearly, effectively and efficiently associates them with MUSIC for their domain name purposes as well as for those registrants who want to reach Internet users who identify with it.

.MUSIC will also increase pricing competition in the top-level domain name space by assuring that .MUSIC domain names are priced at levels that are appropriate to the vast majority of potential registrants to whom .MUSIC is targeted.

Internet consumers benefit from this increase in competition, as less confusing and clearly associated .MUSIC domain names will make it easier for them to know that the owner of the second-level domain name is a member of or seeks to associate with MUSIC.

Likewise, .MUSIC will help significantly increase differentiation in the top-level

domain space. Existing leading generic top-level domain names, such as .COM, .NET and .ORG no longer require and no longer represent any real differentiation in association, purpose or content. Newer top-level domains, such as .XXX, .AERO and .MUSEUM, do represent differentiation, but are either inappropriate or unavailable to most prospective registrants at whom .MUSIC is targeted. .MUSIC will further increase differentiation by allowing registrants to be associated, and consumers to know that the registrant seeks to associate with music.

In terms of user experience, .MUSIC will provide users with a top-level domain name that allows them to easily recognize that the registrant seeks to have its second-level domain name and content associated with music. We believe this will be of substantial benefit to the Internet user community in generally--and the music industry specifically--as it will allow them to more easily and more readily understand the purpose or motives of the registrant's website or email, allowing for better, more efficient and more effective use of their time online.

On balance, and for the reasons set forth above, a .MUSIC domain will be in the public's interest; it will serve as a catalyst to promoting music; and it will benefit the music industry.

The Objector

11. The Objector is the American Association of Independent Music ("A2IM"). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry's market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which

include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others. And it has a general “mission statement” which includes passages such as:

“Fair Trade

A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.

New Technology and Distribution

A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.

Access to Media

Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.

Legislative

A2IM will represent the Independent sector’s interests in government and legislative issues.

A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice”.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though

of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM’s Objection is being conducted by Mr Constantinou Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communiqué of the GAC (Government Advisory Committee) to ICANN:

“Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .music is one of them.

18. What difference does this make to this case? The GAC has not said that .music should not be allowed at all (as it has in the case of some other strings). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant contends that the Objector has failed to prove any aspect of the standing requirement, namely that an Objector must be “an established institution associated with a clearly delineated community.” It says that the Objector is not an *established institution*, that there is no such thing as a *clearly delineated* music community and if there is the Objector is not associated with it.

23. I would add that the first test for a successful opposition overlaps with the test for standing. For the first test requires that the “community invoked by the objector is a clearly delineated community.”

Is A2IM an established institution?

24. In considering whether an institution is established the Rules (specifically Guidebook rule 3.2.2.4) provide the following guidance:

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

25. A2IM has been in existence since 2005. It was not formed as having anything to do with domain names but to act as an industry association for small American record companies. The Objector compares A2IM with “other, larger music-industry trade groups such as the RIAA and ASCAP.” It says, unchallenged in the Response, that “The RIAA is the leading recording industry trade group in the United States and its prominence extends internationally. ASCAP is the world-wide leader in performance royalties for artists and rights holders”. The suggestion is that because A2IM is not as established as these other larger and older organisations it cannot be regarded as established.

26. I reject that. Although its membership (I here exclude associate membership) is essentially American and does not even consist of the majority American Indie labels, to my mind A2IM is, on balance, to be regarded as established. There is no reason to suppose its existence is precarious despite its small size; its voice is clearly at least listened to by at least the US Government and policymakers in the US. The US market is important globally and it would be fanciful to hold that A2IM has no recognition whatever outside the US.

A music community?

27. The Applicant says there is no such thing. I accept that submission. There is a vast range of different types of music in the world. The Applicant puts it graphically when it says: Mozart's Requiem in D Minor (1791) and Skrillex's Scary Monsters and Nice Sprites (2010) are very different and one might not have been considered "music" in the time of the other. That both count as "music" is proof of the lack of heterogeneity within the term "music."

28. Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make all mankind into a "music community" – the word will not stretch that far. There is no cohesion or relationship between all those concerned with creating performing, recording or "consuming" music of all the different sorts known to mankind. There is no public recognition of such a thing as the "music community." There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

29. I am not at all clear what A2IM says the music community is. It refers to the "independent music community" or "sector" meaning independent music labels, but that cannot possibly constitute a global music community as a whole. In other places it invokes all its members and associate members. But even if you took them all as being a "community" (which I do not) they could only form a part of the global citizenry (nearly all mankind) which has an interest of any sort in music of any sort. In its additional submission A2IM suggests that the community consists of its membership in the context of the clear delineation requirement. But A2IMs membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind.

"Clearly delineated"

30. As for a music community which is "clearly delineated" the Objector is in an even worse position. The supposed community is formless – there are no boundaries, formal or informal for it – how one says one person is within it and another without.

31. A2IM does not focus on "clear delineation" save in its additional submission. As I have said there it suggests delineation by virtue of membership of A2IM. True it is that membership or not provides a clear delineation of some sort, but it is not a clear delineation of those targeted by the proposed gTLD, not the right sort of "clear delineation."

Association

32. The only direct association A2IM has is with its members. It invokes an association (which has to be an “ongoing”) with a clearly delineated community via its members and associate members – in short it claims association in a representative capacity. It says its members have the necessary association and it can invoke that association because it represents its members and acts as their agent or spokesman.

33. That raises the question of to what extent A2IM has authority to represent its members, either full or associate, and in relation to what. Only if it has their authority to speak for them in relation to this dispute can it invoke the relationships its members may have with the target of the proposed gTLD.

34. I do not think it is proved that it has any such authority. I have drawn attention to the absence of any formal document setting out A2IM’s general authority. The fact that it has spoken in relation to some other matters (as recounted on its website) does not cloak it with authority to speak for all its membership about all matters. I cannot infer from what it has done that A2IM has authority to speak for all its members in relation to gTLDs.

35. Indeed there is evidence pointing the other way. For A2IM sought support from its members. Only a minor proportion of these were willing to write letters of support (the letters form Appendix H to the Objection, although the Objection itself refers to Exhibit A). And as regards that minor proportion I am not satisfied that have any real objection to this particular objection – none of the letters indicate much more than general concern about what might happen if there is mismanaged .music gTLD. None of the letters indicate that the author has even read the Application form.

36. As to A2IM’s associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM authority to speak for it in relation to any specific matter and specifically for this Objection. It is unthinkable, for instance, that A2IM has authority to speak for major corporations such as Apple (iTunes) or Spotify about anything.

37. I conclude that A2IM does not have any sufficient association with the invoked community, even if that be Indies or its own members, still less with the record industry as a whole and even less with the targeted “community”.

38. I therefore hold that A2IM lacks standing for all the above reasons. The Applicant therefore prevails.

Further Observation

39. Even if that were wrong, I am satisfied that the Objector has failed to make out the detriment test, namely whether:

“the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Significant portion

40. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

41. I think the answer on the evidence is clearly no. Only 18 label members (out of 210 in all) wrote supporting letters – 8.5%. They are of course a much smaller proportion of the world Indie population and still less of the world record company industry. They do not amount to a significant portion of the community targeted.

Material detriment

42. As I have said I am not satisfied even those who wrote in support demonstrate any real objection to this particular application or indicate why it would cause them material detriment.

43. The gist of the letters of support is that if .gTLD is not well managed or has no proper controls it may attract applicants who act illegally and in particular infringe or facilitate infringement of copyright. The Applicant clearly disavows allowing this (see its application). And if this fear were really well founded the entire world record industry would be up in arms – majors and Indies alike have a common interest in the suppression of piracy. The absence of a universal clamour makes it clear to me that the record industry as a whole does not fear material detriment. Its likelihood is not proved. This is an independent further reason for dismissing the Objection.

Costs

44. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

45. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music's Objection is dismissed and the Applicant, Entertainment Names Inc., prevails.
2. Entertainment Names Inc. is entitled to refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date:18th Feb 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/477/ICANN/94

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

VICTOR CROSS, LLC

(USA)

(Consolidated with Cases No.

CASE No. EXP/462/ICANN/79

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
CHARLESTON ROAD REGISTRY INC. (USA)

and

EXP/463/ICANN/80

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
DOT MUSIC LIMITED (GIBRALTAR)

and

EXP/467/ICANN/84

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs.
DOTMUSIC INC. (UAE)

and

EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
ENTERTAINMENT NAMES INC. (BRITISH VIRGIN ISLANDS))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD in issue: .MUSIC

Nature of Objection: Community

American Association of Independent Music (“A2IM”)

Objector

-v-

Victor Cross, LLC

Applicant

The Parties and their Representation

The Objector: American Association of Independent Music (“A2IM”) of
Contact Information Redacted Contact Information Redacted

represented by Constantinos Roussos of DotMusic, Contact Information Redacted
Contact Information Redacted and Jason Schaeffer of ESQwire.com
P.C., Contact Information Redacted

The Applicant: Victor Cross, LLC of
Contact Information Redacted Contact Information Redacted

Represented by John M. Genga and Don C. Moody of The IP & Technology Legal
Group, P.C. dba New gTLD Disputes of Contact Information Redacted
Contact Information Redacted

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, Contact Information Redacted
Contact Information Redacted appointed on 12th June 2013, files transferred to
me on 12th August 2013 shortly after relevant fees paid.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-1571-12951). The Objection was lodged on 13th March 2013 and the Response on May 22nd 2013.
2. On 7th May 2013, the International Centre for Expertise of the ICC (“Centre”) consolidated this case with cases EXP/462/ICANN/79 (*A2IM v Charleston Road Registry*)

Inc.) EXP/463/ICANN/80 (*A2IM v Dot Music Limited*), EXP/467/ICANN/84 (*A2IM v DotMusic Inc.*) and EXP/470/ICANN/87 (*A2IM v Entertainment Names Inc.*) because the applied for string, .music, and Objector were the same in all cases. The effect of consolidation is not to make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

4. On 12th August 2013, following my appointment as Expert by the Chairman of the Standing Committee of the ICC International Centre for Expertise on 19th June 2013, the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 15th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

5. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 7th September 2013 the Applicant duly submitted an additional written statement dated 6th September 2013 with supporting annexes.

6. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

7. Much more specifically the rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and
- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

8. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these are proved then a community objection is successful in the case concerned. If they are not then it will be for other procedures within ICANN to determine what happens. I am not concerned with these

Who the parties are and what they do or propose to do

The Applicant

9. The Applicant's ultimate parent company is called Donuts Inc., a company which has wide ambitions for gTLDs having, through subsidiaries, applied for 307 of them. Donuts believes it has set in place safeguards which go beyond those required by ICANN in order to maintain access as open as possible and yet control copyright infringement.

10. More specifically this is what the Applicant says in its Application about the mission/purpose of its proposed .gTLD .music:

THE .MUSIC TLD

This TLD is attractive and useful to end-users as it better facilitates search, self expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN's new TLD program.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants,

Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

This TLD will be attractive to registrants with affinity for the term MUSIC. This is a broad and diverse group: producers, performers, distributors, composers, authors, historians, publishers, merchandisers, equipment manufacturers, reviewers, broadcasters, venue operators, and many others. Importantly, it is also place of expression for the people who make everything else about music possible — the millions of individual fans who love music and want to express their passion for it through an online presence. These fans are typically not part of a formal, organizational structure exclusively related to music, but nevertheless have a critical place as registrants in the MUSIC TLD. The TLD will operate in the best interests of ALL global music participants — in a legitimate and secure manner.

The Objector

11. The Objector is the American Association of Independent Music (“A2IM”). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as

YouTube, Amazon and others. And it has a general “mission statement” which includes passages such as:

“Fair Trade

A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.

New Technology and Distribution

A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.

Access to Media

Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.

Legislative

A2IM will represent the Independent sector’s interests in government and legislative issues.

A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice”.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules (particularly Guidebook Rule 2.2.2.4) themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since

it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM’s Objection is being conducted by Mr Constantinos Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communique of the GAC (Government Advisory Committee) to ICANN:

“Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self--regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non---exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .music is one of them.

18. What difference does this make to this case? The GAC has not said that .music should not be allowed at all (as it has in the case of some other strings). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant contends that the Objector has failed to prove any aspect of the standing requirement, namely that an Objector must be “an established institution associated with a clearly delineated community” It says that the Objector is not an *established institution*, that there is no such thing as a *clearly delineated* music community and if there is the Objector is not associated with it.

23. I would add that the first test for a successful opposition overlaps with the test for standing. For the first test requires that the “community invoked by the objector is a clearly delineated community.” In this connection I do not accept the Applicant’s submission that “clearly delineated” for the substantive test of standing is “more stringent” than that for standing. The language is the same - an appeal to redundancy alone cannot confer a different meaning when none is necessary.

Is A2IM an established institution?

24. In considering whether an institution is established the Rules (specifically rule 3.2.2.4 of the Guidebook) provide the following guidance:

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

25. The Applicant takes two preliminary points before addressing what the Guidebook provides specifically. It submits that “a small industry segment does not amount to a community in the sense required by the standard” and that “a co-applicant cannot properly object.” In the latter connection the Applicant equates A2IM with Mr Roussos’ co-applicant company.

26. I reject both points. There is no express requirement that an Objector be a “community”. The test for an established institution is as in the Rules (specifically rule 3.2.2.4). Nor is there anything in the Rules which says a rival applicant (which is what the Applicant means by “co-applicant) cannot raise a community objection. Indeed one can easily envisage perfectly legitimate examples of this – for instance where the string is clearly targeted at a particular community which has its own application for the string concerned.

27. Thus I simply ask whether A2IM is an established institution within the meaning of the Rules. It has been in existence since 2005. It was not apparently formed as having anything to do with domain names (I reject the implied hint otherwise by the Applicant) but to act as an industry association for small American record companies. The heart of the Applicant’s submission here is that the evidence provided by A2IM about itself and its constitution is too inadequate for a finding of established institution. It submits:

“Objector fails to provide any information regarding its existence, save an empty assertion about “its first 7 years.” It claims to “serve the Independent music community” and to represent “a broad coalition of music labels compris[ing] over 32.6% of U.S. music industry’s market share (38% of digital sales).” *Id.* at 4. Yet, Objector offers no evidence of its jurisdictional formation, its members, their tenure or their sales to support any aspect of these sweeping claims. Rather, it makes unsworn statements in its Objection and refers to its own self-serving website as evidence of its group’s composition. *See* Objn at 4- 5. It volunteers no organizational documentation whatsoever, and nothing from any “member” confirming its status as such. Indeed, Objector confirms that it came together no earlier than seven years ago, *id.* at 7, undoubtedly when ICANN began developing its new gTLD program.

Further, even if verified with reliable independent evidence, Objector’s own assertions reflect extremely narrow representation of a handful of *independent* music industry interests *in the United States*. This belies any “global” recognition among the numerous music interests throughout the world that have nothing to do with Objector’s specific constituency. The dearth of evidence from Objector makes it impossible for the Panel to find a “global” institution “established” and functioning for purposes independent of this Objection. Objector does not meet its burden to *prove* this necessary element of standing.”

28. Although its membership (I here exclude associate membership) is essentially American and does not even consist of the majority of American Indie labels, to my mind A2IM is, on balance, to be regarded as established. There is no reason to suppose its existence is precarious despite its small size; its voice is clearly at least listened to by at least the US Government and policymakers in the US. The US market is important globally and it would be fanciful to hold that A2IM has no recognition whatever outside the US.

A music community?

29. The Applicant says there is no such thing. I accept that submission. There is a vast range of different types of music in the world. Music appeals to nearly all mankind. The Applicant puts it aptly, saying that the term “music” may include an indefinable range and number of people, subjects and types of expression”. Just because there is one word covering all kinds of music does not make all mankind into a “music community” – the word will not stretch that far. There is no cohesion or relationship between all those concerned with creating performing, recording or “consuming” music of all the different sorts known to mankind. There is no public recognition of such a thing as the “music community.” There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

30. I am not at all clear what A2IM says the music community is. It refers to the “independent music community” meaning independent music labels, but that cannot possibly constitute a global music community as a whole. In other places it invokes all its members and associate members. But even if you took them all as being a “community” (which I do not) they could only form a part of the global citizenry (nearly all mankind) which has an interest of any sort in music of any sort. In its additional submission A2IM suggests that the community consists of its membership in the context of the clear delineation requirement. But A2IM’s membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind.

“Clearly delineated”

31. As for a music community which is “clearly delineated” the Objector is in an even worse position. The supposed community is formless – there are no boundaries, formal or informal for it – how one says one person is within it and another without.

32. A2IM does not focus on “clear delineation” save in its additional submission. As I have said there it suggests delineation by virtue of membership of A2IM. True it is that membership or not provides a clear delineation of some sort, but it is not a clear delineation of those targeted by the proposed gTLD, not the right sort of “clear delineation.”

Association

33. The only direct association A2IM has is with its members. It invokes an association (which has to be an “ongoing”) with a clearly delineated community via its members and associate members – in short it claims association in a representative capacity. It says its members have the necessary association and it can invoke that association because it represents its members and acts as their agent or spokesman.

34. That raises the question of to what extent A2IM has authority to represent its members, either full or associate, and in relation to what. Only if it has their authority to speak for them in relation to this dispute can it invoke the relationships its members may have with the target of the proposed gTLD.

35. I do not think it is proved that it has any such authority. I have drawn attention to the absence of any formal document setting out A2IM’s general authority. The fact that it has spoken in relation to some other matters (as recounted on its website) does not cloak it with

authority to speak for all its membership about all matters. I cannot infer from what it has done in the past that A2IM has authority to speak for all its members in relation to gTLDs.

36. Indeed there is evidence pointing the other way: for A2IM sought support from its members. Only a minor proportion of these were willing to write letters of support (the letters form Appendix H, although the Objection refers to exhibit A). And as regards that minor proportion I am not satisfied that have any real objection to this particular objection – none of the letters indicate much more than general concern about what might happen if there is mismanaged .music gTLD. None of the letters indicate that the author has even read the Application form. It is not indeed clear that the authors are aware that A2IM is supporting (or tacitly supporting by not opposing) Mr Roussos' company's application. None begin to say why that application is acceptable and this one is not.

37. As to A2IM's associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM authority to speak for it or its members (if it has them) in relation to any specific matter and specifically for this Objection. It is unthinkable, for instance, that A2IM has authority to speak for major corporations such as Apple (iTunes) or Spotify about anything. A mere assertion that A2IM represents a vast range of people and organisations is not good enough. As the Applicant acidly observes in relation to A2IM's claim to represent artists via their membership of an associate member: "one wonders if any of these artists has even heard of A2IM."

38. I conclude that A2IM does not have any sufficient association with the invoked community, even if that be Indies, still less with the record industry as a whole and even less with the targeted "community".

39. I therefore hold that A2IM lacks standing for all the above reasons. The Applicant therefore prevails.

Further Observation

40. Even if that were wrong, I am satisfied that the Objector has failed to satisfy the detriment test, namely whether:

"the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."

Significant portion

41. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

42. I think the answer on the evidence is clearly no. Only 18 label members (out of 210 in all) wrote supporting letters – 8.5%. They are of course a much smaller proportion of the world Indie population and still less of the world record company industry. They do not amount to a significant portion of the community targeted. The same is true even if one considers just the world's independent record labels

Material detriment

43. As I have said I am not satisfied even those who wrote in support demonstrate any real objection to this particular application or indicate why it would cause them material detriment. It is not indeed clear that that the authors are aware that A2IM is supporting (or tacitly supporting by not opposing) Mr Roussos' application.

44. The gist of the letters of support is that if a .gTLD is not well managed or has no proper controls it may attract applicants who act illegally and in particular infringe or facilitate infringement of copyright. The Applicant clearly disavows allowing this (see its application). And if this fear were really well founded the entire world record industry would be up in arms – majors and Indies alike have a common interest in the suppression of piracy. The absence of a universal clamour makes it clear to me that the record industry as a whole does not fear material detriment. Its likelihood is not proved. That is another, independent, reasons for dismissing the Objection.

Costs

45. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

46. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music's Objection is dismissed and the Applicant, Victor Cross, LLC, prevails.
2. Victor Cross, LLC's, is entitled to a refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Rules.

Date:17th February 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 *Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/459/ICANN/76

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

AUBURN HOLLOW, LLC

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD opposed: .BAND
Nature of objection: Community

**American Association of Independent Music (A2IM)
(USA)**

Objector

-v-

**Auburn Hollow, LLC
(USA)**

Applicant

The Parties and their Representation

The Applicant: 10500 NE **Contact Information Redacted**
Contact Information Redacted

represented by John M. Genga and Don C. Moody of The IP & Technology Legal
Group, P.C. of **Contact Information Redacted**
Contact Information Redacted

The Objector: American Association of Independent Music (A2IM) of **Contact Information Redacted**
Contact Information Redacted

represented by Constantinos Roussos of DotMusic, **Contact Information Redacted**
Contact Information Redacted and Jason Schaeffer of ESQwire.com
P.C., **Contact Information Redacted**

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, **Contact Information Redacted**
Contact Information Redacted appointed on 12th June 2013 and file
transferred to him on 12th August 2013.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its Application for the gTLD .band on 13th June 2012 (ID 1-1350-42613). The Objection was lodged on 13th March 2013 and the Response on May 19th 2013.

2. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

3. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 16th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

4. By my interim ruling of 19th August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 6th September 2013 the Applicant duly submitted an additional written statement, a supporting affidavit of Mr Nevett and exhibits.

5. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

6. Much more specifically the rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

(1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

(2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

7. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether the Applicant should be awarded the gTLD .band. My task is

more limited: to decide whether the Objector concerned has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful. If it is not then it will be for other procedures within ICANN to determine what happens next. I am not concerned with these.

Who the parties are and do or propose to do

The Applicant

8. The Applicant's ultimate parent company is called Donuts Inc., a company which has wide ambitions for gTLDs having, through subsidiaries, applied for 307 of them. The Objector calls this a "landgrab." The Applicant says it will create economies of scale and allow more consumer choice. I am neutral about these observations for it is not my function to do more than consider whether or not the Objector has standing and has made out a case on the facts of this case. In all cases Donuts believes it has set in place safeguards which go beyond those required by ICANN in order to maintain access as open as possible.

9. More specifically this is what the Applicant says in its Application about the mission/purpose of its proposed .gTLD .band:

ABOUT DONUTS

Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model. To achieve its objectives, Donuts has recruited seasoned executive management with proven track records of excellence in the industry. In addition to this business and operational experience, the Donuts team also has contributed broadly to industry policymaking and regulation, successfully launched TLDs, built industry-leading companies from the ground up, and brought innovation, value and choice to the domain name marketplace.

DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:

1. to make sure that the Internet remains as safe, stable and secure as possible, while
2. helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits. While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1. Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;

2. Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3. Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4. Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

10. The Application goes on to indicate that Donuts has ample resources, security and experience. It says it “will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary”.

The Objector

11. The Objector is the American Association of Independent Music (“A2IM”). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in

the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM’s Objection is being conducted by Mr Constantinos Roussos whose own company DotMusic is itself seeking the gTLD .band as well as .music (this is what I understand from p.2 of the Applicant’s Additional Written Statement). This is not without significance for it makes plain that A2IM does not object to the gTLD .band as a matter of principle, merely to this Application and that in the other .band case I have to decide. After all if .band is in principle possible then the case comes down to competition between the competing applications. As regards the possibility of registration, no one is saying it cannot be done at all. A2IM is clearly being used as vehicle for Mr Roussos to try to eliminate competition for the string .band. That is not fatal to the Objection (see below) for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communiqué of the GAC (“Government Advisory Committee”) to ICANN.

Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3....

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- **Intellectual Property**

Here are listed a number of strings. .band is one of them.

18. Although the Objector suggests ICANN has accepted that advice, the actual position (as appear from Mr Nevett’s affidavit of 6th September 2013) is that ICANN is in discussion with the GAC about this and other so-called “sensitive” strings. I do not think it matters, however. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel but for ICANN.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the material does not relate to new facts. It, along with the responsive Additional Written Statement, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant says the Objector lacks standing for four distinct reasons:

- (a) The Objector is not entitled to claim community status merely because it claims to represent an industry segment;
- (b) The Objector is effectively a co-applicant in that it supports Mr Roussos' company's application for .band. It is contended that co-applicants of their supporters cannot properly object.
- (c) The Objector is not an *established institution* with the Rules;
- (d) The Objector has no *ongoing relationship with a clearly delineated community*.

23. The first two objections are not founded on anything specifically in the Rules.

24. More particularly objection (a) is at least in part covered by provisions in the Rules (e.g. the requirement for a clearly delineated community). It seems to me that to the extent that the Rules cover it, they do. To the extent they do not, the objection simply is not open. I will consider the industry segment point below.

25. As regards objection (b) it is in the nature of an abuse of process objection. In effect it is saying that this is only a string contention issue which falls to be dealt with under Module 4 of the Rules. Again there is nothing in Module 3 which makes the fact that an Objector has a string contention objection of any sort a community ground of objection. On the other hand the fact that the Objector in effect supports a rival application must, as I have said, weaken any community objection which it seeks to raise.

26. Accordingly I reject reasons (a) and (b) as freestanding objections to standing.

27. As to (c), *established institution*, the Applicant submits

An “established institution” should have: (a) a level of global recognition; (b) existence for some length of time; and (c) historical evidence of existence, such as a formal “charter” showing formation not merely “in conjunction with” the new gTLD process. Here, Objector fails to provide any information regarding its existence, save an empty assertion about “its first 7 years.” Objn at 7. It claims to “serve the Independent music community” and to represent “a broad coalition of music labels compris[ing] over 32.6% of U.S. music industry’s market share (38% of digital sales).” *Id.* at 4. In support, Objector offers no claim or evidence of its jurisdictional formation and/or reach or identification of its members and their tenure. Objector only offers unsworn, self-serving hearsay as to its formation and composition *See* Objn at 4-5. It volunteers no organizational documentation whatsoever, suggesting that Objector came together no earlier than seven years ago at the time that ICANN began the policy development for new gTLDs. *Id.* at 7.

Further, Objector’s extremely narrow representation of a handful of *independent* music industry interests *in the United States* belies any “global” recognition among the numerous music interests throughout the world that have nothing to do with Objector’s specific constituency. The dearth of evidence from Objector makes it impossible for the Panel to find a “global” institution “established” and functioning for purposes independent of this Objection.

28. I reject this submission. The Objector’s website conveys to me an organisation which has had an independent existence for some eight years now. Although its members do not even comprise the majority of US Indie Labels, that is no reason for saying it is not established. It is true that the Objector is an essentially American only organisation, but the US being as commercially significant as it is, the Objector is bound to have some global outreach. It was clearly not established for any purpose connected with gTLDs. It is also true that there is no formal charter or validation by a government or the like, but the fact that the US Government is open to representations from A2IM seems to me a clear indication that it is regarded as established.

29. But (d) is much more problematic. This part of the standing requirement is linked with the first test which must be proved by one who has standing. For in my view these two subjects are interrelated. To have standing a party must be an “established institution associated with a clearly delineated community”. And the first test which must be passed for one who has standing is whether “The community invoked by the objector is a clearly delineated community.”

30. The .band string is explicitly or implicitly targeted at groups of musicians who collectively perform music and who are described as “bands.” Not all such groups of

musicians are so-described (e.g. orchestras or choirs are not called band) but many are – from bands of popular musicians to the town band or the brass bands of the North of England. Of course commercially speaking it is pop music bands which matter most – both from the point of view of making recordings and live performance but the targeting must include all sorts of band.

31. Can all the various disparate types of groups of performers around the world who might fall with the description “band” be described as “a community”? I think not. Just because a group of musicians may be called a “band” does not mean it forms part of anything which can fairly be called a “community” of bands.

32. A2IM’s members are not themselves bands at all. Its members doubtless have an interest in the bands signed to them, but that interest is only indirect. A2IM does not represent or even purport to represent bands of any sort. Although it exhibits letters of support from some of its members, there are none at all from any actual band or its manager so far as I can see – indeed bands themselves cannot be members of A2IM. It is not shown (e.g. by reference to a constitution) that A2IM even has authority to speak for its members in relation to this dispute.

33. As to A2IM’s associate members, whilst they very probably support some of the work which A2IM does, I cannot see merely by becoming an associate member a party thereby confers on A2IM to speak for it in relation to any specific matter. It is unthinkable, for instance, that A2IM have authority to speak for Apple (iTunes) or Spotify. Still less can one take it that A2IM speaks for any band which may be associated with any particular associate member.

34. Moreover there is simply no evidence of any relationship, ongoing or otherwise, between A2IM and anything which might be described (if it were possible – which I do not think it is) as a community of bands.

35. In these circumstances I conclude that it is not proved that there is such a thing as a community of bands or that A2IM is “associated” with any bands at all, still less with a “clearly delineated community” of bands.

36. I therefore hold that A2IM lacks standing to make this Objection. The Applicant therefore prevails.

Other Points

37. That being so it is not strictly necessary for me to go further. I will, however, consider the question of “detriment” (rule 3.5.4 of the Guidelines).

38. More specifically I cannot see that the grant of the Application would cause any, still less material, detriment to a band community, supposing such a thing existed. No actual band of any sort supports the Objection. And the Objection itself is not to .band in principle (rather, A2IM is supporting Mr Roussos’s application for .band). The Objection alleges that the string will be abused by “bad actors” but fails to spell out how, given that the Applicant will not only comply with ICANN guidelines but has offered additional safeguards.

39. At the very least, since it supports Mr Roussos’ application for .band, the Objector should have demonstrated how that Application would not cause detriment but this one would. I just do not see that. So I hold, and this is another distinct reason for dismissing the Objection, that the detriment requirement is not made out.

Costs

40. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party , as determined by the panel, its advance payment in costs, The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

41. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The Objection of American Association of Independent Music is dismissed and the Applicant Auburn Hollow, LLC prevails.

2. The Applicant, Auburn Hollow, LLC, is entitled to a refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date:18th Feb 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/460/ICANN/77

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

RED TRIANGLE LLC

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD opposed: .band
Nature of objection: Community

American Association of Independent Music (USA)

Objector

-v-

Red Triangle LLC (USA)

Applicant

The Parties and their Representation

The Applicant: Red Triangle LLC of
Contact Information Redacted

Contact Information Redacted

represented by Thomas Brackey, Stephen Crump and Joshua Zetlin of Freund &
Brackey LLP, Contact Information Redacted
Contact Information Redacted

The Objector: American Association of Independent Music (“A2IM”) of
Contact Information Redacted

Contact Information
Redacted

represented by DotMusic, Constantinos Roussos of Contact Information Redacted
Contact Information Redacted and Jason Schaeffer of ESQwire.com
Contact Information Redacted

The Panel

The Rt. Hon. Professor Sir Robin Jacob of the Faculty of Laws, UCL,
Contact Information Redacted

Contact Information Redacted

appointed on 12th June 2013, file transferred
to him on 12th August 2013.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .band on 13th June 2012 (Application ID 1-856-54878). The Objection was lodged on 13th March 2013 and the Response on 19th May 2013.

2. On 12th August 2013 sought leave to file an additional submission and new information and reply to the Applicant's Response. By an emailed letter of August 15th 2013 the Applicant contested the Panel's power to admit the new material or if there is such a power whether a case for admission of the material was made out. The letter also provided a response to the new material if I decided it should be admitted. By email of 19th August 2013 Mr Crump confirmed that if I admitted the new material, the letter should stand as the Applicant's response to it. I could therefore render my decision on admissibility as part of my overall expert determination.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary.

4. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these the Rules but where appropriate will identify the particular rule concerned.

5. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

(1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

(2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4

6. Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

7. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether the Applicant (or in the other .band case I have to decide) should be awarded the gTLD .band. My task is more limited: to decide whether the Objector concerned has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is made out in the case concerned. If is not it will then be for other procedures within ICANN to determine what happens next. I am not concerned with these.

The Panel's Power to admit Fresh Evidence and Submissions

8. Before I proceed to apply the Rules to this case I must deal with the question of the fresh evidence and submissions. I ruled on the Panel's powers in this regard in case EXP/474/ICANN/91 in an interim decision of 30th July 2013, (*International Federal of Arts Councils and Culture Agencies v .Music, LLC*). I need do no more there than quote what I said there:

“3.¹ Articles 17 and 18 of the Rules provide:

Article 17. Additional Written Submissions

(a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.

(b) The time limits fixed by the Panel for additional written submissions shall not exceed thirty (30) days, unless the Panel, having consulted the DRSP, determines that exceptional circumstances justify a longer time limit.

Article 18. Evidence

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

4. The parties are in dispute as to the effect of these Rules. In summary, the Applicant contends that further submissions can only be admitted in an "exceptional circumstances." The Objector contends that neither Art. 17 nor Art. 18 contain any reference to an "exceptional circumstances" as governing the admissibility of additional written submissions. The reference to "exceptional circumstances" is only about justifying a longer period than 30 days for submission of additional written submissions.

5. The Objector further contends that Rule 17 must be construed liberally. At the very least there must be a power to admit Submissions in Reply to the Applicant's Response, but the power is wider than that. It goes on to say that its "Additional Submissions" are indeed essentially in Reply to the Response.

6. I accept the Objector's submissions about the power to admit further submissions. Although the procedure is intended to speedy, it is also flexible but under the control of the Panel. It is wholly improbable that there is no right of reply or restriction on augmentation of a case save for "exceptional circumstances." On its face Art. 17 (1) looks forward only and can only be initiated by the Panel (decide shall submit") but if there is power in the Panel to call for submissions in the future, there must be

¹ This paragraph was also numbered as "4." in the original decision.

power to admit submissions already provided. The greater must include the less. That power is not circumscribed by any requirement of "exceptional circumstances."

7. I therefore hold that a Panel has power to admit additional submissions of a party without there having to be "exceptional circumstances."

8. It does not of course follow that additional submissions can be submitted and admitted as of right. There must be a case for their admission. The power is to be exercised taking into account all the circumstances of the particular case concerned - as with any other procedural power in a court or tribunal. The following factors at least will be relevant:

(a) Whether the opposite party will suffer any prejudice by admission of the further submissions;

(b) Whether the admission of the submissions would cause delay;

(c) At what stage of the proceedings the admission is sought;

(d) The relevance of the further submissions. If they are clearly irrelevant they will be denied, but if they are arguably relevant that may be enough at the admission stage;

(e) How far the submissions raise entirely new matter or change the complexity of the case;

(f) The extent to which the further submissions are in reply to matter pleaded by the opposite party.

(g) Whether there is a public interest involved - either in registration or its refusal. If there is (or may be) then there is likely to be a stronger case for admission of new material than in what might be called "merely a private fight."

Of these factors (a) and (b) are particularly important, for if there is no prejudice and no likely delay, it is difficult to see what harm would result from their admission.

9. There is also this. At the stage of determining admissibility the Panel will not go deeply into the merits of the case: that is for the final determination. All that has to be considered is the *prima facie* relevance of submissions."

9. So I think there is power to admit fresh evidence and submissions. It is not confined to "exceptional cases" but nonetheless a case for its admission must be made out. The real question is whether the power should be exercised on the facts of the case under consideration.

Admission of the Fresh Submissions in this Case

10. Here the application for admission was made effectively as soon as it could be –on the same day as the files in this case were transferred to me. Mr Crump for the Applicant does not suggest there is any procedural prejudice if the material is admitted.

11. Part of the material sought to be admitted clearly could not have formed part of the original objection because it happened after that was submitted. This is the information concerning the GAC Beijing Communique issued on 11th April 2013. The Objector says it is relevant, the Applicant not. That is a matter I determine below, but it seems to me that the point is one fairly to be considered and that is a good reason for its admission.

12. The remainder of the material is said to be in reply to the Applicant’s Response. Some of it could probably have been put in originally but I consider it, along with Mr Crump’s Answer, helpfully to refine the argument and I therefore admit it.

Who the parties are and do or propose to do

The Applicant

13. The Applicant is a Californian company. Its mission/purpose according to its application form reads:

“Red Triangle, LLC, the applicant for the “.band” gTLD (the “Registry”), will serve all persons with an interest in music. Across the globe, there currently more than 8 million bands, powering a music industry that generates approximately \$30 billion dollars in fan-driven commerce annually. With the market for music consumption increasingly shifting online and growing globally, bands now market themselves through websites, to connect with existing fans and further develop their base. Newly formed bands seek to develop their online presence. Consequently, the formation of a new band often results in the registration of a domain name and related website. Ideally, these websites create a platform for bands to connect with their fans, through band-related information, socialization and commerce; but in practice this process is fragmented and? inefficient. By contrast, established bands have already created online communities, with whom they strive to communicate more effectively. The Registry will provide a mechanism for accomplishing this goal. As for the general public, the present structure of the music industry obscures the relationship between the performer and the listener. .band will allow for direct interaction. The Registry will thereby serve all who possess this most significant passion – a love of bands and their music.

The gTLD will become an online space dedicated to the fan experience and the efforts of bands to reach their fans through music, information and merchandise. Bands and their fans will now have a dedicated and dynamic online community.

The Registry will also provide the bands themselves with an invaluable resource to protect and disseminate their original content. By building communities around bands, key geographies and music genres, the Registry will enhance communication, searchability and access to relevant information; thereby fostering innovation, job creation, economic growth and creative opportunities among registrants, internet users and other interested parties”.

14. The application explains this in more detail:

“What the proposed gTLD anticipates adding to the current space, in terms of competition, differentiation, or innovation: Competition:

The proposed gTLD will promote competition by creating a digital environment dedicated to all social, informational and commercial aspects of bands and their fans. There are currently over 107,000 active domain names that include “band” in their string. Of these, “band.” currently resides in roughly 66,000 registered domains immediately preceding various TLDs (e.g. www.rockband.com). The “.band” TLD will shorten the string length for these existing domains (e.g. www.rock.band) and provide an appealing and intuitive opportunity for registrants. With a dedicated platform for the band sector, new, improved, and/or shorter domain names will be sought by participants; thereby contributing to competition in the current space by offering consumers more choices and registrants more marketable domain names. Additionally, a huge market exists for newly formed bands to create their own band website and develop their own music communities with a .band TLD. As the public increasingly accepts new gTLDs, the Registry envisions registrants will seek out TLDs that describe their nature or activities. Accordingly, new bands will look to the .band TLD first, when establishing their web presence. These bands will register domain names as tools to collect and disseminate information to fans and service providers, plan concert tours, showcase their music, share photos and news, link to various social networks, sell merchandise, etcetera.

Differentiation:

The fundamental difference between .band and all other gTLDs is its dedication to organizations and participants associated with musicians. The proposed gTLD will create a space exclusively devoted to musical artists and interests. To achieve this differentiation, beyond simply providing domain names, the Registry will, in accordance with Specification 9 of the Registry Agreement, proactively develop and maintain innovative websites to create and enhance industry specific communities dedicated to bands of all sizes and those who appreciate their music. Innovation: The proposed gTLD will catalyse innovation by creating an online community devoted to bands, their music and their fans. Registrants and users will in turn take advantage of the opportunities for increased communication, access to information, visibility and commerce to develop new methods of advancing their interests. All will benefit from this vibrant and dynamic collaborative process. For example, category and geography-based search vehicles will connect more consumers, businesses and other resources, allowing for a more robust and efficient exchange of information. In addition, .band will allow for the following innovations:

- Search: optimized and customized
- Community-specific premium names that will be utilized for the benefit of all interested parties
- Targeted and more cost-effective advertising
- The ability to create and analyze community metrics
- Lay the foundation for a community-specific e-commerce platform
- The increasing use of domains for bands – as a planning, communication and commerce tool
- Intellectual Property protection mechanisms
- Development of interactive applications

These innovations will add new experiences and opportunities to the space, directly benefiting registrants and indirectly benefiting users and others”.

15. The application form goes on to say:

“Goals the proposed gTLD has in terms of user experience:

The Registry envisions a greatly enhanced user experience by providing resources to its constituents, including interest-specific information, communication channels, markets, together with new collaborative and business opportunities. The quality of the user experience will improve as the Registry provides resources to its constituents, including interest-specific information, communication channels, markets, collaborative, philanthropic and business opportunities. Registrants will have the opportunity to contribute their own content to the space, thereby enhancing the community nature of the gTLD. The goal of the .band TLD is to be the destination and home for all band-oriented online activity. Moreover, ARI, the gTLD’s registry service provider, will ensure that all pertinent services consistently meet the levels prescribed in Specification 10 of the Registry Agreement, guaranteeing a top quality user experience. In addition, ARI will comply with any other applicable ICANN policy or procedure, thereby ensuring the user experience provided is both secure and stable. Strategic partner Melbourne IT will ensure top quality consumer interface and policy compliance.”

One more sentence from the Application form is sufficient to complete the picture for present purposes:

“The Registry will reach out to major bands and other music industry resources, as well as use community-building platforms to generate publicity for the proposed gTLD and will welcome all registrants seeking a “.band” domain.”

The Objector

16. The Objector is the American Association of Independent Music (“A2IM”). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

17. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

18. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others.

19. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

20. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to

companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

The Fresh Evidence and submissions

21. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communiqué of the GAC (“Government Advisory Committee”) to ICANN.

Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- Intellectual Property

Here are listed a number of strings. .band is one of them.

22. I am not sure whether ICANN has accepted this advice or not. The Objector says it has and the Applicant not. I do not think it matters. For what is clear is that none of the Rules which I have to apply have not been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of the Rules.

23. Moreover the advice does not suggest ICANN should change any of the the Rules as to a community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

24. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

25. The Objector also relies on three recent reports. This is what it says about them:

Many new reports emphasize the clear likelihood of material harm that could arise from open sensitive music-themed strings:

a) Namesentry's recent Anti-Abuse TLD Report supports finding that restricted (i.e. community based) TLDs are safer than open TLDs

b) Verisign, the credible and recognized operator of .COM, recently warned about the "farreaching and long-lasting residual implications" on the global DNS and voiced its concerns over the "operational readiness for gTLD Registries" – in this case Portfolio applicants – and risks relating to "privacy, trust, confidence, or the overall security of the DNS" resulting in "large scale security and stability issues and hard-to-diagnose corner cases where consumer expectations are unaddressed or users are provided an unsafe or otherwise less than desirable experience."

c) The recent re-launch of .PW by Directi (Parent company of .MUSIC Applicant DotMusic Inc.) as an open string - with nearly identical open policies as its .MUSIC application with ID 1- 1058-25065 - serves as another strong indicator about the certainty of material harm in the case of open, sensitive and highly popular music-themed gTLDs. According to Symantec, .PW jumped to #4 in Symantec's TLD spam security rankings.⁵⁹ It was stated that almost 50% of all spam URLs contained .pw.⁶⁰, and Namesentry's Anti-Abuse Report also confirms .PW as the most abused TLD this year. Experts warned that, despite the .PW registry, Directi, having "a fine set of rules forbidding spam and other evil" effectively-scaling compliance manually was unmanageable. Reactionary policies alone are vulnerable to increased compliance cases. The case of .PW "should be a lesson" for new open TLDs that managing abuse is no easy feat. Experts agree that open gTLD policies for sensitive strings compromise both trust and mitigating abuse the "problem is that they are reactive, as opposed to proactive."

26. I fail to see what these general reports have to do with the specific proposed .band string. They are not concerned with it – their concern is much more general- about open or closed strings. As Mr Crump tersely observed: "While each of these reports certainly raises issues that should inform the development of ICANN policies going forward, none of them specifically relates to .BAND's potential impact on the music industry."

27. I therefore hold that these reports are irrelevant to what I have to decide.

28. The remainder of the material does not relate to new facts. It, along with Mr Crump's reply, helps focus the issues. It is to these I now turn.

Standing and "Clearly Delineated Community"

29. Red Triangle contends, rightly in my view (and without demur by the Objector), that these two subjects are interrelated. To have standing a party must be an "established institution associated with a clearly delineated community". And the first test which must be passed for one who has standing is whether "The community invoked by the objector is a clearly delineated community." So if the "established institution" part of the standing test is passed (as I think is tacitly accepted here, after all A2IAM was established well before the possibility of seeking gTLDs was seriously considered and was established for reasons wholly unconnected with TLDs) is whether there is a clearly delineated community and if so whether the Objector is associated with it.

30. The Objector contends that there is such a community and that it is associated with it. The Applicant says not so.

31. The .band string is explicitly or implicitly targeted at groups of musicians who collectively perform music and who are described as "bands." Not all such groups of musicians are so-described (e.g. orchestras or choirs are not called band) but many are – from bands of popular musicians to the town band or the brass bands of the North of England. Of course commercially speaking it is pop music bands which matter most – both from the point of view of making recordings and live performance but the targeting includes all sorts of band.

32. Can one fairly describe all the various disparate types of groups of performers around the world who might fall with the description "band" "a community?" I think not. Just because a group of musicians may be called a "band" does not mean it forms part of anything which can fairly be called a "community" of bands.

33. A2IM's members are not themselves bands at all. Its members doubtless have an interest in the bands signed to them, but that interest is only indirect. A2IM does not represent or even purport to represent bands of any sort. Although it exhibits letters of support from some of its members, there are none at all from any actual band or its manager so far as I can see – indeed bands themselves cannot be members of A2IM.

34. As to A2IM's associated members, whilst they very probably support some of the work which A2IM does, I cannot see merely by becoming an associate member a party thereby confers on A2IM to speak for it in relation to any specific matter. It is unthinkable, for instance, that A2IM have authority to speak for Apple (iTunes) or Spotify. Still less can one take it that A2IM speaks for any band which may be associated with any particular associate member.

35. In these circumstances I conclude that it is not proved that there is such a thing a community of bands or that A2IM is "associated" with any bands at all, still less with a "clearly delineated community" of bands.

36. I therefore hold that A2IM lacks standing to make this Objection. The Applicant therefore prevails.

Other points

37. That being so it is not necessary for me to go further. I will, however, make findings about two of the other matters which A2IM needed to prove. Firstly, as Mr Crump rightly submitted, it has failed to show any opposition let alone substantial opposition, from bands of any sort. Some sort of support from some (6%) of A2IM's members is shown. But even that support is not targeted at the specific gTLD .band – as Mr Crump observes the word "band" does not appear in any of the "supporting" letters. Moreover the majority of A2IM's own members have not evinced support despite encouragement from A2IM to do so in relation to "music themed TLD applications" via its website. And A2IM's members are but a minor part of the number of Indie labels in the US, still less the World. The Rules set out some of the factors to be considered in judging substantiality. Substantial opposition as defined by these (see Rule 3.5.4 of the Guidebook) is not remotely proved.

38. Finally I am not satisfied that *the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted* (Rule 3.5.4 of the Guidebook) There is a lot of general complaint about the levels of copyright infringement on the web generally, but no evidence that the Applicant will facilitate infringement. True it is that Red Triangle intends to leave .band unrestricted, but it by no means follows that it will be a haven for pirates. It is obviously not in its commercial interests to allow that. And there is nothing about how this specific gTLD would cause detriment (still less *material detriment*) to a

significant portion of music groups around the world who fall within the generic word “band”.

Costs

39. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Provider shall refund to the prevailing part, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

40. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The Objector, American Association of Independent Music’s Objection is dismissed and the Applicant, Red Triangle LLC prevails.
2. The Applicant, Red Triangle LLC, is entitled to a refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date: 18th February 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

.....

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

ANNEX B

ICANN Re-Consideration Request filed by .MUSIC

Additional Submissions



International Chamber of Commerce

The world business organization

International Centre for Expertise □ Centre international d'expertise

**ICC EXP/462/ICANN/79 (c. EXP/463/ICANN/80, EXP/467/ICANN/84,
EXP/470/ICANN/87 and EXP/477/ICANN/94)**

**REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION
&
NEW INFORMATION & CONSOLIDATED REPLY TO APPLICANTS'
RESPONSES**

gTLD Objector objects to [.music]

Name	.MUSIC (App. IDs: 1-1680-18593, 1-1058-25065, 1-994-99764, 1-1571-12951, 1-1175-68062)
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**REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION IN REPLY
TO APPLICANTS' RESPONSES TO OBJECTION**

Objector, pursuant to the Rules for Expertise of the ICC, ICC Practice Note on the Administration of Cases, and Attachment to Module 3 – New gTLD Dispute Resolution Procedure (the “Rules”), hereby requests leave to present an additional submission to address new information, and reply to specific points contained in Applicant’s Response to Objection.

Request for the Panelist’s Acceptance of Objector’s Additional Submission

In accordance with Article 17 of the Attachment to Module 3 the Panelist may accept additional submissions in a time period not to exceed (in the absence of exceptional circumstances) a thirty (30) day period for submissions. Art 17.

Where new information is raised, presented or available, a party should be permitted to submit clarifying or responsive statements in the interest of justice. A Panelist now having been duly appointed and the materials forwarded to the Panelist for consideration, the time for submission and consideration of an Additional Statement is appropriate. Indeed, prior to ICC confirmation and release of the materials to the Panel any submission would be premature. Moreover, the Additional Submission addresses: 1) newly raised information that post-dates the Objection, pertain to, among other things, the ICANN Meeting in Durban; and 2) information raised in Applicants’ Responses.

The New Information & Consolidated Reply below addresses new (post-Objection) statements from the Governmental Advisory Committee (the “GAC”) of ICANN, and also responds to specific points presented in the Responses. Based on the foregoing, Objector submits that there is no prejudice and no undue delay of the proceeding. To avoid delay, and to provide a basis for consideration, the Additional Submission is included below.

In light of the importance of these Objections, and the significant community and public issues at stake, Objector respectfully submits the Consolidated Additional Submission below for the Panelist’s consideration and evaluation.

CONSOLIDATED ADDITIONAL SUBMISSION

NEW INFORMATION & REPLY TO APPLICANTS’ RESPONSES

1. Government Advisory Community (GAC) Support for .Music as a Sensitive String.

On April 11, 2013, after the filing of the Community Objections, the GAC¹ issued its Beijing Communique that provides, among other things, that:

- a) Sensitive strings (such as music strings) are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm... safeguards should apply to strings that are related to these sectors; Beijing Communique Annex 1, Safeguards on New gTLDs, Category 1, p.8;²
- b) The creation of an appropriate governance structure for sensitive strings by establishing a “working relationship with relevant... bodies” and “developing a strategy to mitigate... risks of fraudulent, and other illegal, activities.” Id. at p.8; and
- c) In those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information. Beijing Communique at p.4

This Objection - based on a collective and clear music community opinion - should be upheld especially because ICANN’s New gTLD Program Committee considered these points and responded by accepting this important GAC advice³ and addressing the need for added

¹ <https://gacweb.icann.org/display/gacweb/About+The+GAC>, “The GAC’s key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN’s activities or policies and national laws or international agreements. GAC is regularly attended by approximately 50 national governments, distinct economies, and global organizations such as the ITU, UNESCO, the World Intellectual Property Organization (WIPO), INTERPOL and regional organizations such as the OECD, Asia Pacific Forum, and Council of Europe”

² In its Beijing Communique advice to ICANN, GAC has identified music-themed gTLDs (.music, .song, .tunes and .band) as sensitive strings to which enhanced safeguards should apply to, https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf, GAC Communique – Beijing, PRC, dated April 11, 2013.

³ <https://www.icann.org/en/news/correspondence/crocker-to-dryden-06jun13-en.pdf>, Letter from ICANN to GAC RE: Beijing Advice, Annex 1, GAC Register #5, P.11

safeguards.⁴ GAC has identified music-themed gTLDs as sensitive strings and notes that opinions of any relevant community (especially those in a contention set), to be strongly taken into consideration. Music-themed strings, "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm" and should have "new strengthened safeguards."

Objector, ICANN, and GAC share a similar concern that allowing sensitive, open music-themed applications to proceed without appropriate safeguards⁵ and community governance structure assuring no conflicts of interest could produce material harm especially given the semantic importance, sensitivity and popularity of a music-themed string. On June 26, 2013, Senator Rockefeller, in his capacity as Chairman United States Senate Committee on Commerce, Science & Transportation, urged ICANN to carefully consider the GAC advice and the proposed safeguards.⁶

Furthermore, on July 17, 2013, at the Durban Meeting, the GAC re-addressed these points, stating that there should be a preference for "all applications which have demonstrable community support" and noted "community concerns over the high costs for pursuing a Community Objection process."⁷ See Final GAC Communique Durban, Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6). The GAC also urged ICANN "to take better account of community views, and improve outcomes for communities, within the existing framework." Id.

Globally recognized and highly credible associations strongly associated with the creative communities – whose business models are dependent on copyright protection and monetization – also have voiced serious concerns⁸ that there will be a likelihood of material harm without appropriate enhanced safeguards in place. These highly relevant opinions serve as additional evidence that there will be a strong likelihood of harm if enhanced safeguards are missing from an open sensitive string such as .MUSIC.

2. Objector Satisfies ICANN's Community Definitions and Criteria Background.

ICANN's definitions pertaining to Community are clear and Objector satisfies each of the following definitions:

"Community" is defined as "meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest."⁹ Here, the common interest shared by the community is clear: the "promotion and distribution of legal music." Objector is the "advocate" for "independent music."¹⁰ Objector's Members look to it to protect their (the independent music community's) interests;

⁴ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>, NGPC Approved Resolutions, dated June 25th, 2013

⁵ Coalition for Online Accountability Memorandum to ICANN

http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁶ U.S. Senate Committee on Commerce, Science & Transportation Letter to ICANN, dated June 26th, 2013

http://images.politico.com/global/2013/06/26/rockefeller_letter_to_icann.pdf

⁷ Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6).

https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2,

⁸ See Comments to GAC Advice <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/>

⁹ AGB Definitions Module 4-11 <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹⁰ Objector's Mission <http://a2im.org/mission/>

"Delineation" Under the AGB, Module 3.2.2.4, "delineation" relates to having "mechanisms for participation," "institutional purpose," and "boundaries."¹¹ Moreover, under AGB Module 4.2.3 "delineation" relates to "clear and straight-forward membership."¹² A2IM's membership is clear and straight-forward,¹³ and only globally-recognized institutions with core activities relating to the promotion and distribution of legal music are eligible for membership. Additionally, Objector's Members have clear and straight-forward membership criteria for their members with high level, formal boundaries e.g. (i) DotMusic's Music Community Member Organization ("MCMO") membership is limited to globally-recognized organizations involved in the promotion and distribution of legal music.¹⁴ (ii) Reverbnation¹⁵ and CDBaby¹⁶ have clearly, defined membership criteria with high level, formal boundaries.

"Size" and "Substantial Opposition" ICANN's definition of "Size" and "Substantial Opposition" relates to "a significant portion of the community"¹⁷ – i.e. not the entire community - "that may be explicitly or implicitly targeted." Substantial opposition should be taken within "context rather than on absolute numbers"¹⁸ of a substantial portion of the community. In 2012 there were 42,100 employed musicians¹⁹ in the U.S, a country which represents 58% of the global digital music market²⁰ and 27% of the global music market share.²¹ In this context, some of A2IM members alone represent a significant portion of the global community e.g. Reverbnation (3m artists)²² or CDBaby (largest online independent music distributor²³ with 300k artists).²⁴

Applicants' arguments against Objector's standing also ignores A2IM Associate Members entirely, including one of Applicant's largest competitors, Apple iTunes,²⁵ and another example of a group with "clear membership" with "formal boundaries, geographic reach and size."²⁶ iTunes accounts for 63% of global digital music market²⁷ – a majority - with 575 million active global members²⁸ who have downloaded 25 billion songs from iTunes catalog of over 26 million songs, available in 119 countries. Furthermore, iTunes is global and agnostic of a musician's territory and whether they are unsigned, independent or in a major label.²⁹

Objector's Members were advised of the Objector's concerns and the concerns were made public and also circulated to Members.³⁰ Objector has been vocal about the concerns

¹¹ See AGB Module at 3-7 <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

¹² See AGB Module at 4-11 <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹³ Objector's Membership Summary <http://a2im.org/about-joining/>

¹⁴ <http://music.us/mission.htm#community-member-organization-cmo>, MCMOs: <http://music.us/supporters.htm>

¹⁵ http://www.reverbnation.com/main/terms_and_conditions#top

¹⁶ <http://members.cdbaby.com/membercontract.aspx>

¹⁷ <https://community.icann.org/display/newgtldrg/community+objection+grounds>

¹⁸ <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>, Module 4-11

¹⁹ U.S Department of Labor Statistics, <http://www.bls.gov/oes/current/oes272042.htm>

²⁰ <http://www.billboard.com/biz/articles/news/digital-and-mobile/1556590/ifpi-2013-recording-industry-in-numbers-global-revenue>

²¹ http://www.ifpi.org/content/section_resources/rin/RIN_Content.html

²² <http://www.reverbnation.com/>

²³ <http://finance.yahoo.com/news/cd-baby-partners-leading-media-090000860.html>

²⁴ <http://members.cdbaby.com/aboutcdbaby.aspx>

²⁵ <http://a2im.org/groups/itunes>

²⁶ <http://www.apple.com/legal/internet-services/itunes/www/index.html>

²⁷ <http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share>

²⁸ <http://appleinsider.com/articles/13/06/14/apple-now-adding-500000-new-itunes-accounts-per-day>

²⁹ <http://www.apple.com/pr/brary/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>

³⁰ Objector's Posted Comments March, 2011-2013 RE: ICANN and the .MUSIC string Concerns

<http://a2im.org/tag/icann/>

raised in the Objection and its Board approved the filing of the Objection. As the representative, indeed, the stated and recognized advocate of its Members, Objector has the authority to act on their behalf. Accordingly, Objector has standing and its concerns are properly set before this Panel.

3. Objector and its Representative Entities Have a Substantial Global Reach

In Response, Applicants ignore the far geographical reach of Objector and its Members who, while diverse, share one common goal: the “promotion and distribution of legal music.” Even a cursory review of Objector’s website and stated policies demonstrates that its members are comprised of both “Label Members” and “Associate Members.”³¹ The Responses ignore the relevance of A2IM Associate Members.³² As set forth below, Objector and its Members enjoy significant public recognition as the leading participants in and voices of the global music community – in many cases Objector’s Members have decades of experience and recognition in developing and promoting music interests. Since 2011, A2IM has been publicly open and transparent in its emails and public correspondence to its Members in relation to ICANN-related affairs³³ and concerns over new gTLDs and music-themed gTLDs,³⁴ including notable mentions in the established music industry trade publication Billboard on the topic of music-themed gTLDs.³⁵ For the reasons set forth below, Objector’s standing as a representative and advocate for a significant portion of the music community is clear.

a) Objector and its Members Are Recognized for International Representation of Musicians’ Rights & Interests.

Objector’s “Mission & Objectives” are to serve as a voice for the “Independent music community” representing a significant portion of the U.S market. Its “Objectives” include, but are not limited to, supporting music internationally through “multilateral trade agreements” and to “promote international visibility” of the Independent Music Sector in the “global marketplace.” To that end, Objector’s participation and recognition by the U.S Government as an important advocate for international music trade activities³⁶ counters Applicant’s assertions. A2IM members also include highly relevant music entities linked to global governments, such as France (BureauExport³⁷), China (China Audio Video Association³⁸) and Germany (Initiative Musik supporting German music).³⁹ These three A2IM members alone (together with U.S market) represent substantial music economies and a significant portion of the community.

Objector is strongly associated with numerous recognized and delineated global music coalitions,⁴⁰ the Coalition for Online Accountability,⁴¹ and national coalitions such as MusicUnited.⁴² A2IM affiliates,⁴³ such as the MusicFirst Coalition,⁴⁴ the Copyright Alliance,⁴⁵ and

³¹ Objector’s Membership Summary <http://a2im.org/about-joining/>

³² Objector’s Associate Membership http://a2im.org/contents/?taxonomy=c_sitewide_group&term=associate

³³ Objector’s Posted Comments March, 2011-2013 RE: ICANN and New gTLD Concerns <http://a2im.org/tag/icann/>

³⁴ <http://a2im.org/2013/02/04/call-to-action-please-write-icaan-about-how-music-should-be-administered/>

³⁵ <http://www.billboard.com/biz/articles/news/1176863/fight-over-music-domain-approvals-continue>

³⁶ U.S Government International Trade Commission, <http://www.usitc.gov/publications/332/pub4393.pdf>, 3-9 and C-3,

<http://www.usitc.gov/search-ui/search/C.view=default/results?s=&sa=0&hf=20&q=A2IM>, May 2013

³⁷ <http://a2im.org/groups/french-music-export-office>

³⁸ <http://a2im.org/groups/china-audio-video-association-cava>

³⁹ <http://a2im.org/groups/initiative-musik-gmbh>

⁴⁰ <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdfJAXI5xkylm.pdf>

⁴¹ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁴² http://www.musicunited.org/1_whocares.aspx

the World Independent Network (WIN).⁴⁶ Through these affiliations and associations Objector demonstrates it is an established institution strongly associated with the string and a global “substantial and clearly delineated community.”

b) *DotMusic Limited is a Member of Objector and its Community Overlaps A2IM*

Objector and its Members believe that music-themed strings best serve the interests of the community under a multi-stakeholder governance model to eliminate strong conflict of interest likelihood. Moreover, many A2IM members are supporting organizations and related entities to DotMusic, also an A2IM member.⁴⁷ Accordingly DotMusic’s voice - as an A2IM member - and its global supporting MCMO members⁴⁸ (See “Other Related Objector Entities” supporting Objector to demonstrate Objector’s standing per ICC Rules (emphasis added) in Appendix) - which also overlap with A2IM - is relevant to this Objection.

DotMusic MCMO members are strongly associated with a substantial portion of the global music community: the only recognized international federation representing arts councils and governments ministries of culture from 72 countries (“IFACCA”); digital music distributors accounting for a significant majority of all music distributed on legal music stores globally; country-led music coalitions; international music export offices; and the only recognized international association representing music information centers from 37 countries.

As an A2IM Member, DotMusic’s MCMO members are, by definition, represented by A2IM. This association “ties” A2IM with DotMusic’s clearly delineated music community⁴⁹ including its nexus with string. With respect to “Size,” DotMusic’s digital music distributor MCMOs (nearly all of whom are A2IM Members): (i) Ingrooves – an A2IM member - is associated⁵⁰ with the major (non-independent) Universal Music Group (Universal has 32.8% music market); (ii) TheOrchard is associated⁵¹ with the major Sony Music (Sony Music has 29.1% music market share⁵²); (iii) Tunecore, with over 500,000,000 sales, distributes more music in one month than all major labels have combined in 100 years.⁵³ Another MCMO, LyricFind, is associated with the content licensing of 2,000 music publishers, including all four majors: EMI Music Publishing, Universal Music Publishing, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing.⁵⁴

Objector, and its Members and Affiliates, meet the ICANN objector criteria as publicly and internationally recognized, established institutions with ongoing relationships with a clearly delineated music community⁵⁵ and a common, shared interest focused on the global “promotion

⁴³ http://a2im.org/contents/?taxonomy=c_sitewide_group&term=associate

⁴⁴ musicFIRST Coalition, with founding members A2IM, RIAA, and The Recording Academy (Grammys), represents musicians, recording artists, managers, music businesses and performance right advocates. The Coalition expanded their unanimous music industry support to include dozens of partner organizations and groups supporting a performance right, <http://www.musicfirstcoalition.org/coalition>

⁴⁵ <http://www.copyrightalliance.org/members>

⁴⁶ <http://winformusic.org/win-members/>

⁴⁷ <http://a2im.org/groups/music-us>

⁴⁸ <http://www.music.us/supporters.htm>

⁴⁹ <http://www.music.us/supporters.htm>

⁵⁰ <http://www.universalmusic.com/corporate/detail/544>

⁵¹ <http://www.billboard.com/biz/articles/news/1098586/orchard-ioda-merging-sony-music-to-invest-in-new-company-sources>

⁵² <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>

⁵³ <http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html>

⁵⁴ <http://www.lyricfind.com/about-lyricfind/>

⁵⁵ 3.5.4 - <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

and distribution of legal music.” Accordingly, Objector has established its standing and substantial opposition to the Application.

4. Open gTLDs Associated with Sensitive Strings Lacking Pro-Active Policies and Appropriate Enhanced Safeguards⁵⁶ will Create Material Harm and Abuse.

Many new reports emphasize the clear likelihood of material harm that could arise from open sensitive music-themed strings:

- a) Namesentry’s recent Anti-Abuse TLD Report supports finding that restricted (i.e. community based) TLDs are safer than open TLDs.⁵⁷
- b) Verisign, the credible and recognized operator of .COM, recently warned about the “far-reaching and long-lasting residual implications” on the global DNS and voiced its concerns over the “operational readiness for gTLD Registries” – in this case Portfolio applicants – and risks relating to “privacy, trust, confidence, or the overall security of the DNS” resulting in “large scale security and stability issues and hard-to-diagnose corner cases where consumer expectations are unaddressed or users are provided an unsafe or otherwise less than desirable experience.”⁵⁸
- c) The recent re-launch of .PW by Directi (Parent company of .MUSIC Applicant DotMusic Inc.) as an open string - with nearly identical open policies as its .MUSIC application with ID 1-1058-25065 - serves as another strong indicator about the certainty of material harm in the case of open, sensitive and highly popular music-themed gTLDs. According to Symantec, .PW jumped to #4 in Symantec’s TLD spam security rankings.⁵⁹ It was stated that almost 50% of all spam URLs contained .pw.⁶⁰, and Namesentry’s Anti-Abuse Report also confirms .PW as the most abused TLD this year.⁶¹ Experts warned that, despite the .PW registry, Directi, having “a fine set of rules forbidding spam and other evil” effectively-scaling compliance manually was unmanageable. Reactionary policies alone are vulnerable to increased compliance cases. The case of .PW “should be a lesson” for new open TLDs that managing abuse is no easy feat.⁶² Experts agree that open gTLD policies for sensitive strings compromise both trust and mitigating abuse the “problem is that they are reactive, as opposed to proactive.”⁶³

5. The 1998 Digital Millennium Copyright Act (DMCA) and 2001 European Copyright Directive (EDEC) Laws are Outdated, Ineffective and Not Global.

In context of the Objection, the ineffectiveness of the DMCA and European Directive copyright laws to address rampant online copyright infringement/piracy, the lack of appropriate and pro-active enhanced safeguards for music-themed strings will result in material abuse, piracy, cybersquatting, spamming, economic and reputational harm i.e. interference with the

⁵⁶ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 6, Section 5, July 2013

⁵⁷ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

⁵⁸ New gTLD Security and Stability Considerations, www.verisigninc.com/assets/gtld-ssr-v2.1-final.pdf and <http://www.sec.gov/Archives/edgar/data/1014473/000101447313000012/form8-k32813xex992.htm>, 2013, Pg. 1 and Pg. 6

⁵⁹ <http://www.symantec.com/connect/blogs/rise-pw-urls-spam-messages>

⁶⁰ <http://www.technewsworld.com/story/78073.html>

⁶¹ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

⁶² John Levine (Spam Expert), <http://jl.ly/Email/palau.html> and <http://jl.ly/Email/pwnope.html>

⁶³ Thomas Barrett, President of registrar Encirca http://www.ciracleid.com/posts/20130530_role_of_trust_in_determining_a_new_tlds_business_success/

music community's core activities.⁶⁴ These repercussions are unquestionably predictable considering the size and popularity of music and the community's history of widespread online infringement and vulnerability to a higher risk of online abuse."⁶⁵

While the matter has just been filed, on August 6, 2013, the National Music Publishers' Association (NMPA) and others filed suit against Fullscreen, Inc., a Multi-Channel Network that is behind Google's (Application ID 1-1680-18593) YouTube product's most popular "music channels." It is alleged that Fullscreen, Inc. controls over 15,000 YouTube channels with more than 200 million subscribers. These channels allegedly promote the dissemination of illegal unlicensed music to hundreds of millions of viewers and have persisted in these activities⁶⁶ which Google again profits from. Warner/Chappell Music Inc. et al. v. Fullscreen Inc. et al., 13-cv-05472 (S.D.N.Y). It is no secret that the music community is in a continual battle with Google to address copyright infringement issues on its YouTube platform, its search engine and its existing system that lacks the appropriate safeguards that the new gTLD for .MUSIC requires.

6. Applicants Should Be Evaluated Based on their Applications

The Applications in question should be evaluated based on only policies and facts contained in the respective Applications. Promises by Applicants of "plans" to implement policies to address concerns found in their Application or to circumvent the Objection are neither contractually binding nor permitted. New measures and statements not contained in the Application and, which effect 3rd-parties and contention sets should be deemed material changes. To hold otherwise would create an unfair precedent and allow applicants to circumvent otherwise inadequate applications, with broad statements of intended plans of action. Per ICANN, failure to notify ICANN of any material change would render any information provided in the application false or misleading and could result in denial of the application. See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7.

In the context of this string, such changes should "be construed as unfair," because they would "affect string contention," and "affect other third parties materially,"⁶⁷ such as community applicants that already submitted Applications that have appropriate restrictions and enhanced safeguards included and specifically enumerated in their Applications. Any abstract statements by Applicants pertaining to future plans to implement new policies/measures⁶⁸ or to implement any new ICANN gTLD Application policy changes not clearly described in Application should be deemed material changes. Accordingly, the Panel should evaluate the Objection and the Applicants' policies or lack thereof based on the four-corners of a particular Application.

⁶⁴ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 4, Section 3, July 2013

⁶⁵ Music Coalition letter to ICANN, <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/msg00092.html> (<http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdf/JAXl5xkyLm.pdf>)

⁶⁶ NMPA August 6, 2013 Press Release <http://www.nmpa.org/media/showwhatsnew.asp?id=92>

⁶⁷ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7

⁶⁸ For example, Famous Four Media (under .MUSIC Application ID 1-1175-68062) created "Governance Councils" for their open gTLDs. Their open gTLD does not include proactive safeguard policies or restrictions and does not represent the community's interests because this "Council" – to be created at some point in the future - would have limited influence beyond what is mentioned in the Application. Per the AGB any enhanced Council-recommended pro-active policies that differ from the Application could be deemed as material application changes (not allowed by ICANN)

Conclusion

It is respectfully submitted that the Applicants applied-for music-themed string gTLD lack the appropriate pro-active enhanced safeguards required for such a sensitive string to prevent highly probable risks, illegal activities and abuses which materially harm the community and compromise consumer protection. The music-themed gTLD is properly served by a multi-stakeholder community-based governance model that ensures there are no conflicts of interests and the music-themed strings are launched in the global public interest and serve the entire music community not one corporate entity and its conflicted financial interests.

Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)

A copy of this Request for Leave to File Additional Submission in Reply to Applicants' Responses and the Consolidated Additional Submission was transmitted to the Applicants on August 12, 2013 by email to the following address: Contact Information Redacted
Contact Information Redacted

Respectfully submitted:

Date: August 12, 2013



Signature: _____

Jason B. Schaeffer
ESQwire.com, P.C.
Contact Information Redacted

Counsel for Objector



International Chamber of Commerce

The world business organization

International Centre for Expertise □ Centre international d'expertise

NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION & REPLY TO APPLICANT’S RESPONSE TO THE OBJECTION

References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

Disputed gTLD

gTLD Objector objects to [.example]

Name	.MUSIC (Application ID: 1-959-51046)
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If there is more than one gTLD you wish to object to, file separate Objections.

REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION IN REPLY TO APPLICANT'S RESPONSE TO OBJECTION

Objector, the International Federation of Arts Councils and Culture Agencies ("Objector or IFACCA"), through its undersigned counsel, and pursuant to the Rules for Expertise of the ICC, ICC Practice Note on the Administration of Cases, and Attachment to Module 3 – New gTLD Dispute Resolution Procedure (the "Rules"), Objector hereby requests leave to present an additional submission to reply to new information contained in the Applicant's Response to the Objection.

1. Request to the Panel for Leave to File a Reply to Applicant's Response

Although the Rules are silent concerning the filing of additional submissions, as with most proceedings (Court Proceedings or Arbitrations), parties may petition the presiding panel for leave to file a reply to new information asserted in a responsive pleading. Where new information is raised, a party should be permitted to submit a clarifying statement in response. Accordingly, Objector respectfully submits the Additional Submission below for the Panel's consideration.

2. IFACCA's Standing Is Clear:

In its Response, Applicant incredulously argues that Objector has no standing. While Applicant admits that the International Federation of Arts Councils and Culture Agencies ("IFACCA") is an "established institution," Applicant questions "whether [IFACCA] has an ongoing relationship with a clearly delineated community" and whether IFACCA "is strongly associated with the applied for string." (Response at pp.5-6). Applicant's Response marginalizes the importance of international cultural ministries and arts councils and the critical role they play advocating and supporting music arts and education within their countries and abroad. Marginalizing this group of non-commercial artists, fans, and supporters is exactly why the objection should be upheld. Moreover, Applicant conspicuously ignores the overlap between Applicant's and Objector's constituents (See Section 2b, below).

a. Ministries of Culture & Arts Councils are Inextricably Part of Music Community

At the outset, Objector notes that the Panel should take judicial notice that the IFACCA member ministries of culture and arts councils, support musicians, musical performances, independent music artists, and non-commercial musical expression and education in their respective countries. Although it seems to be an elementary and settled point, Applicant questions whether Ministries of Culture and Arts Councils have a relationship with "the music community." Objector notes that the 165 ministries of culture and arts councils that comprise IFACCA support the "performing arts," which includes, but is not limited to music artists and music listeners (otherwise known as "fans") throughout the IFACCA member countries. Indeed, it is submitted that without the financial and logistical support of arts councils and the

ministries of culture, the music community would be adversely affected, and in some countries, may not exist in any appreciable manner.

For example, the Ministry of Culture 2011 budget for the small country state of Cyprus for culture funding was €34,876,522 with substantial support of music activities.¹ Other small government Ministries of Culture, such as Albania,² or government Ministries of Culture and Arts Councils from countries with larger populations, such as India,³ all provide critical support and substantial advocacy for music. Such government institutions also collaborate and advocate through their funded country-based pavilion initiatives at Midem, the world's largest music conference.⁴ Therefore, while it seems quite obvious, out of caution, Objector submits the following evidence to support the direct association, and strong correlation, of IFACCA members with the music community and the string, .MUSIC.

Government ministries and arts councils provide critical support for the music community, including commercial music organizations and a significant portion of the community that Objector asserts Applicant is discriminating against - fans, DIY and independent artists and music bloggers. By way of example, government ministries' and arts councils' substantial connection to and support of "music" is noted in the reports of funding and support for music in Section 2a.i. and the GAC Statement identified in Section 2a.ii as follows:

*i Government Connection to Music Through Investment and Funding
(Annual reports by governments and councils)*

- New Zealand Ministry of Culture has funded significant music projects. Some include the REAL New Zealand Music Tour (\$415,000), the New Zealand String Quartet (\$150,000) and New Zealand Music Commission: (\$1,378,000).⁵
- The Australian Government/Council For The Arts invested \$51.2 million for the nation's orchestras; \$21.6 million for opera; \$10.8 million for other music artists and organizations; \$13.1 million for multi-platform artists and organizations; and \$4 million in miscellaneous funding, including sector building and audience development initiatives and programs.⁶
- Canada Council for the Arts is Canada's national, arts funding agency investing \$28 million in its Canada Council Musical Instrument Bank (Page 16) and \$28,156,000 in Music Arts

¹ 2011 Annual Report for Cyprus Ministry of Culture, Section 1.2 "Music" (http://www.moec.gov.cy/en/annual_reports/annual_report_2011_en.pdf). Activities include Music Performances in Cyprus (1.2.1) and Abroad (1.2.2), Subsidization of Paphos Aphrodite Festival (1.2.3), Music Publications (1.2.4), Subsidization and Purchases of Digital Records (1.2.5), Promotion for Cypriot musical creativity abroad (1.2.6), Cyprus Symphony Orchestra Foundation (1.2.7), Music Information Centre (1.2.8), Developing Music Education (1.2.9), Organising of the 1st Musicological Symposium (1.2.10) and Musical Festivities for the European Volunteerism Year (1.2.11)

² http://www.culturalpolicies.net/down/albania_012011.pdf

³ 2010-11 Annual Report from India Ministry of Culture, [http://www.indiaculture.nic.in/hindi/pdf/Culture-AnRe-2010-2011\(Eng\).pdf](http://www.indiaculture.nic.in/hindi/pdf/Culture-AnRe-2010-2011(Eng).pdf)

⁴ <http://my.midem.com/en/contact-us/pavilion-representatives/>

⁵ 2011 Annual Report from New Zealand Ministry of Culture: [http://www.mch.govt.nz/files/Annual%20report%202011%202012%20pdf%20version%20\(D-0448383\).PDF](http://www.mch.govt.nz/files/Annual%20report%202011%202012%20pdf%20version%20(D-0448383).PDF)

⁶ 2011 Annual Report for the Australia Council for the Arts, http://www.australiacouncil.gov.au/_data/assets/pdf_file/0016/142351/Australia-Council-Annual-Report-201112.pdf, Page 28

- Programs (Page 66).⁷ The Government of Canada also renewed its annual investment of \$27.6 million over five years in the Canada Music Fund.⁸
- The United Kingdom Department for Culture and Education (DfE) will fund music education at significant levels: £77 million, £65 million and £60 million will be available in the three years from April 2012.⁹
- The United States National Endowment of the Arts has awarded more than \$4 billion to support the arts since its inception¹⁰ and has a strong focus on music as outlined in its Strategic Plan¹¹ with Congress requested to provide \$154,465,000 for fiscal year 2014.¹²
- The National Arts Council of South Africa invested 2,536,131R in Music and 9,995,000R in Orchestras and has focused strongly on the “Strengthening of live indigenous music and advocating the revival of the live music circuit in South Africa”¹³
- The Singapore Arts Council will fund \$10.2 million in the arts under its 2013 Grants Framework, including the Ding Yi Music Company and Siong Leng Musical Association.¹⁴
- In 2011, the support for artistic activities by the Arts Council of Finland was €32.4 million of which €4,921,850 was awarded to music.¹⁵

Accordingly, Objector has established its standing as a central supporter of the music arts and culture in at least 165 member countries. Each of IFACCA’s members has a clear association with music, and a mandate to support the “arts” in their countries. In many countries the ministry of culture/arts council is the largest supporter of the music arts.

ii. Government Advisory Community (GAC) Support for Music.

Government association with the music community is further established through the GAC.¹⁶ GAC identified .MUSIC, among others, as a “sensitive” string in the realm of intellectual property that

⁷ 2011 Annual Report for Canada Council for the Arts, http://www.canadacouncil.ca/NR/rdonlyres/6F7549BB-F4E5-4B8B-95F4-1FF9FAFB9186/0/CanadaCouncilAnnualReport2012_COMPLETE.pdf

⁸ <http://www.pch.gc.ca/eng/1294862453819/1294862453821>

⁹ Department for Culture, The Importance of Music, A National Plan for Music Education, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/180973/DFE-00086-2011.pdf, Page 4, 2011

¹⁰ 2011 Annual report for the National Endowment of the Arts, <http://www.nea.gov/about/11Annual/2011-NEA-Annual-Report.pdf>, Page 2

¹¹ NEA Strategic Plan 2012-2016, www.arts.gov/about/Budget/NEAStrategicPlan2012-2016.pdf

¹² http://www.ifacca.org/national_agency_news/2013/04/10/us-president-requests-154465000-neh-2014/

¹³ 2010-2011 Annual Report for the National Arts Council South Africa, National Arts Council South Africa, <http://www.nac.org.za/media/publications/AR%2010-11%20NAC.PDF/download>, Page 11. Also Mmino, the South African – Norwegian Education Music Programme, solely funds music projects funding a total of 294 projects. Thirteen projects were allocated funding for a total of R1,680,600 of which R1,381,000 went towards music educational and R299,600 to exchange projects (Page 10)

¹⁴ Singapore Arts Council, <http://www.nac.gov.sg/media-centre/news-releases/news-detail?id=c2db15e2-c319-40ec-939c-d58735d0a91c>

¹⁵ <http://www.taiteenkeskustoimikunta.fi/documents/10162/31704/TY+tilastotiedote+1+12+.pdf>, Page 1 and Page 23

requires additional safeguards. On April 11, 2013, after the filing of this Community Objection, the GAC issued its Beijing Communique, which provides, among other things, that:

“in those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information.”¹⁷

This advice is central to the evaluation – particularly if applied-for sensitive string(s) are part of a contention set - and highly relevant given this Community Objection, the upcoming Community Priority Evaluations as well as the legitimacy, trust and breadth of the supporting significant portion of the music community it negatively affects.¹⁸ Objector is concerned that by allowing a .MUSIC application to proceed where that Application excludes a significant legitimate portion of a community from registering will create material harm to that community. If legitimate members of a community are excluded from music-themed domain registration that would constitute material harm to the legitimate interests of a significant portion of that corresponding community and those applications should not be allowed past the Initial Evaluation stage. Thus, government ministries and governments have a demonstrated interest in the String and relevant standing to object to the Application.

iii. By Applicant’s Own Definition, Objector has Standing.

Contrary to Applicant’s assertion, the Objector by definition, represents not only the commercial interests of musical artists, it represents non-commercial music supporters and fans in their 165 member countries. Through its Response, discounting the importance of IFACCA, Applicant indicates a disregard for the important voice of millions of independent/DIY musicians and fans worldwide. Moreover, IFACCA has “standing” when judged by Respondent’s own definition for a “clearly delineated community.” In Section 20(a) of their Application, Applicant identifies “two well defined-criteria” to delineate their community as follows:

“(1) Active participation in the creation and development of music, its advocacy and promotion, its professional support, the protection and preservation of the music community’s creative rights, as well as the nurturing of the art through music education; and

(2) Current registration and verifiable membership in a global music community organization that was organized and in existence prior to 2007 (as per ICANN guidelines) who are active participants in the support and representation of the creation and development of music, its advocacy and promotion, its professional support, the protection and

¹⁶ <https://gacweb.icann.org/display/gacweb/About+The+GAC>, “The GAC’s key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN’s activities or policies and national laws or international agreements. GAC is regularly attended by approximately 50 national governments, distinct economies, and global organizations such as the ITU, UNESCO, the World Intellectual Property Organization (WIPO), INTERPOL and regional organizations such as the OECD, Asia Pacific Forum, and Council of Europe”

¹⁷ https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2

¹⁸ <http://music.us/supporters.htm>

preservation of the music community's creative rights, as well as the nurturing of the art through music education.”¹⁹

IFACCA clearly fulfills these criteria, in each member country the ministry of culture/arts council is tasked to support performing arts (i.e. music performance and education) and each were organized long prior to 2007. Groups that form IFACCA's membership²⁰ represent governments and arts councils as well as affiliates with relevant organizations, such as DotMusic whose supporting organizations clearly represent a strictly delineated music community.²¹ IFACCA also has strategic partnerships²² with organizations that have substantial influence on music. For example, a strategic partner of IFACCA²³ is UNESCO, the organization that founded the International Music Council (the “IMC”) in 1949.²⁴ Even Applicant accepts the relevant standing of UNESCO by, among other things, basing its Application's “guiding principles” on the “overarching values, rights and objectives” of the IMC, an arts council itself (emphasis added). Accordingly, Objector as the representative of 165 member countries', UNESCO, and DotMusic's supporters (which overlap with Applicant – as noted in Section 2b. below), has standing in this proceeding to protect the interests of citizens/music fans and musical artists worldwide.

b. DotMusic is a Member of IFACCA & DotMusic's Community Overlaps Applicant's Members

Applicant admits that DotMusic Limited (“DotMusic”) is a member of IFACCA. (Section 24 of Response at p.7). As an IFACCA Member, DotMusic's supporters are, by definition, represented by IFACCA.²⁵ This ultimately “ties” IFACCA with DotMusic's supporting music community.²⁶ The nexus between DotMusic's supporting organizations and music is clear.

For example, DotMusic's digital music distributors and supporting organizations represent over 90% of all legal digital music. Ingrooves, a DotMusic supporter is associated with Universal Music Group (Universal has 32.8% music market share²⁷ and affiliated with Ingrooves²⁸). Likewise, TheOrchard, another DotMusic supporter is associated with Sony Music (Sony Music has 29.1% music market share²⁹ and affiliated with TheOrchard³⁰). Furthermore, the DotMusic supporting organization LyricFind overlaps with the Applicant's supporting community and is associated with the music lyrics licensing of 2,000 music publishers, including all four majors – EMI Music Publishing, Universal Music Publishing Group, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing.³¹ Applicant admits this overlap and diversity: “The structure of the music community is organized through diverse symbiotic and

¹⁹ Applicant's Answer to Question 20a, <https://qtdresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1659?t:ac=1659>

²⁰ http://www.ifacca.org/membership/current_members/

²¹ <http://www.music.us/supporters.htm>

²² http://www.ifacca.org/strategic_partners/

²³ IFACCA's connection to UNESCO is clear. On IFACCA's search engine UNESCO appears 539 in search results (<http://www.ifacca.org/search/?q=unesco&x=0&y=0>).

²⁴ Applicant accepts the relevant standing of UNESCO (<http://www.imc-cim.org/about-imc-separator/relations-with-unesco.html>) by, among other things, basing their “overarching values, rights and objectives” on IMC (<http://www.farfurther.com/faq.html>). On IFACCA's search engine alone there are 539 search results on UNESCO alone (<http://www.ifacca.org/search/?q=unesco&x=0&y=0>).

²⁵ http://www.ifacca.org/membership/current_members/

²⁶ <http://www.music.us/supporters.htm>

²⁷ <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>

²⁸ <http://www.universalmusic.com/corporate/detail/544>

²⁹ <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>

³⁰ <http://www.billboard.com/biz/articles/news/1098586/orchard-ioda-merging-sony-music-to-invest-in-new-company-sources>

³¹ <http://www.lyricfind.com/about-lyricfind/>

sometimes overlapping segments. Although the following list reflects core activities there is a great deal of community intersection and cross-pollination.”

Furthermore, the Applicant reiterates that “governmental institutions” and “arts councils” have standing and are relevant to the Global Music Community (“GMC”), providing, in pertinent part, that the “GMC structure can be illustrated by the following descriptive constituent categories: ...organizations, councils and associations who engage in the education, preservation, nurturing and advocacy of the music community that includes artistic, cultural and governmental institutions, national and international arts councils. (emphasis added).”³²

DotMusic supports the participation of the entire music community in the String – not just commercial interests or “Accredited” Associations organized prior to 2007. DotMusic represents everyone and is all-inclusive. Its policies were developed with input from the Coalition of Online Accountability (representing RIAA, ASCAP, BMI, A2IM) and through personal interactions with many of the Applicant’s supporters (including RIAA, A2IM, ASCAP). Accordingly, as an IFACCA member, DotMusic’s music community Supporting Organizations are also relevant to establishing Objector’s standing in this proceeding. Therefore, given the substantial and irrefutable connection between IFACCAs members and the worldwide music community, the Objector has clear standing to oppose the Application, and its concerns should be heard by the Panel.

3. Applicant’s Application is the Relevant Document for Consideration by the Panel

Applicant has attempted to refute Objector’s concerns by pointing to statements made by Dotmusic outside the four corners of the Application. While it is easy for any party to change its posture to reflect the concerns of the moment, it is the Application that must be evaluated. AGB 3.5.4. ICANN’s gTLD process is based on contractual principles and gTLD evaluations are determined by evaluation of the language contained in the application – not self-serving and morphing statements. Here, Applicant has attempted to deflect the genuine concerns of Objector by citing to statements that conflict with what is stated in their Application. For the Community Objection process to have any meaning, all participants must be evaluated on the same basis – whether or not their policies, as stated in their Application are harmful to members of the community.

Applicant itself confirms that the relationship between the applied-for string and the community identified will extend into a common platform to promote “music advocates and policy makers.”³³ Governments are both advocates and play a leading role in setting laws and statutory royalties pertaining to copyright to protect and enable monetization of music works (e.g. U.S Library of Congress³⁴ and Copyright Royalty Board³⁵). Excluding these entities creates material harm to their legitimate interests. The Applicant also admits that there are “connotations the string may have beyond the community” they describe and acknowledge that the “term or string “music” is also relevant for the consumers or fans of music” and confess that they are “very much a sustaining force and the “raison d’etre” for the Global Music Community” and that “one cannot exist without the other” (emphasis added).

³² Applicant’s Answer to Question 20a, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

³³ Applicant’s Answer to Question 20d, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

³⁴ <http://www.copyright.gov/title17/>

³⁵ <http://www.loc.gov/crb/>

Applicant rationalizes the exclusion of fans by alleging that “the interests of the creators were assumed to be at odds with the interests of the consumers...”³⁶ Applicant also acknowledges that its “definition of the music community does not have individual consumers of music (unless they belong to one of the Member Organizations or of the Global Music Community)...”³⁷ Objector notes that legitimate music fans must not be excluded from the String given their rising increasing influence on artist careers which are heavily reliant on the Internet. According to the 2013 Crowdsourcing Report fan funding has risen 81% to \$2.7 billion. Fans have created a new avenue for artists to raise funds without giving up creative control and have successfully funded more than 1 million campaigns in 2012. The significance of this trend and its impact on music artists is compelling since global crowd funding volume is forecasted to increase to \$5.1 billion.³⁸ Fans will play a more leading role in artists’ careers following the April 2013 signing of the JOBS Act³⁹ allowing fans to become investors in artists’ careers.⁴⁰

In addition to the reasons set forth in the Objection, one of the most troubling exclusionary registration policies that raise serious anti-competitive concerns relates to the Applicants “defined-criteria” for registration that requires “[c]urrent registration and verifiable membership in a global music community organization that was organized and in existence prior to 2007.”⁴¹ ⁴² This means that any legitimate “global music community organization” organized and formed after 2007 does not qualify to become an “Accredited Association,” and, in turn, its members will also be disallowed from registration unless they join an “Accredited Association,” as defined by the Applicant, that was organized before 2007.

The Applicant’s “Accreditation” process is a critical component of their restrictive eligibility registration policy. In response to the GAC Beijing Communique, Applicant submitted a timely GAC Advice Response advising that:

“restricted access to .music is governed by a set of eligibility rules. Potential domain registrants must be members of, or affiliated with, at least one organization in the music community. Domain registrations may be accepted, but will not resolve until the registrant’s membership credentials have been verified. This will require verification of relevant membership data during the registration process. This membership will be crosschecked with the relevant member organization. Verification of continued membership is required for renewal, to ensure ongoing eligibility. The application is open to all those who belong to the community as described in our application.”⁴³

³⁶ Applicant’s Answer to Question 20d, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

³⁷ Ibid

³⁸ <http://www.crowdsourcing.org/editorial/2013cf-the-crowdfunding-industry-report/25107>

³⁹ <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>

⁴⁰ <http://www.forbes.com/sites/work-in-progress/2012/09/21/the-jobs-act-what-startups-and-small-businesses-need-to-know-infographic/>

⁴¹ Applicant’s Answer to Question 20a, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1659?t:ac=1659>

⁴² The Applicant alleges that this registration eligibility policy is an ICANN guideline but it is clearly not. The ICANN Applicant Guidebook Module 4-11 language pertaining to the 2007 date relates to the “definition” of the word “community” and that there was “some understanding of the community’s existence prior to September 2007,” not an ICANN-mandated registration eligibility policy (<http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>)

⁴³ <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-959-51046-en.pdf>, Page 5

Applicant argues that "Accreditation agencies are not forced to share data with a "third-party" (Section 71 of Response, at p.13) but yet the applicant also admits that "the registry" - a third-party - "will check with the accredited agency named by the prospective domain registration for membership status" Id. Furthermore, in Response to the GAC Communiqué, Applicant admits that they will "require verification of relevant membership data." However, despite the clear delineation and eligibility criteria of what constitutes an "Accredited" member of the Applicant's music community, in its Response, the Applicant contradicts itself by stating that "Accreditation is a new process, to be developed by the community through the Policy Advisory Board, which is yet to be formed" (Section 70 of Response, p.13).

The Panel should note, per the Applicant Guidebook, Module 4.2.3, Criterion #3 an Applicant's registration eligibility policies are critical component of the Community Priority Evaluation and scoring is based on the registration policies described in the Application.⁴⁴ The scoring and evaluation is not based on policies that are changing or to be determined at a future date. Such a "change" by Applicant would be considered a "material change" because it directly affects the scoring and the Community Priority Evaluation.⁴⁵ Moreover, changes from an Applicant's stated policies would adversely affect other Applicants in contention. As outlined by ICANN guidelines, "ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application."

Furthermore, because "no single database for all accredited agencies" (Section 72 of Response, at p.13) exists, these "Accredited" Associations will be manually and mutually exclusively verifying registrant memberships. This will result in unnecessary costs to registrants, a likelihood of higher domain registration prices, errors and time delays.

The Applicant also admits that besides the registration price, registrants must incur additional costs such as keeping an ongoing membership with an Accredited Association that could be offered at a "low or no cost" (Section 62 of Response at p.12). If membership with an Accredited Association is "abandoned" then registrants are forced to incur additional "switching" costs to join another Accredited Association to keep their domain (Section 71 of Response, at p.13).

Accordingly, Applicant's policies, as identified in its Application call for the exclusion of a significant portion of the music community. For the reasons set forth in the Objection and those stated above, Objector has identified policies that would cause material harm to the legitimate interests of a significant portion of the music community.

Conclusion

For the foregoing reasons and as exemplified by the Applicant's own "GMC" criteria and music community definition, and as set forth in its Objection, the Objector has irrefutable standing against the Application because it creates a strong likelihood of material harm based on its exclusionary, anti-competitive policies. Such legitimate interests are central to "music" and as such are undeniably a critical part of the future String, .MUSIC. Based on the statements contained in Applicant's Application, Objector notes that Applicant has applied to run the string based on policies that will create inevitable

⁴⁴ Applicant Guidebook, <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Module 4.2.3, Criterion #3 at 4-15 and 4-16

⁴⁵ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>

material harm to the legitimate interests of a significant portion of the music community. Accordingly, the Application is not in the global public interest.

Objector certifies that the information contained in this Additional Submission is to the best of its knowledge complete and accurate, that this Additional Submission is not being presented for any improper purpose, such as to harass, and that the assertions in this Reply to Applicant's Response are warranted under the Rules, the Polices, and any applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.

Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)

A copy of this Request for Leave to File Additional Submission in Reply to Applicant's Response to the Objection is/was transmitted to the Applicant on: May 28, 2013 by email to the following address:
Contact Information Redacted

A copy of this submission is/was transmitted to ICANN on: May 28, 2013 by email to the following address: newgtld@icann.org

Description of the Annexes filed with the Objection (Article 8(b) of the Procedure)

List and Provide description of any annex filed.

No Additional Annexes.

Date: May 28, 2013



Signature: _____

Jason B. Schaeffer
ESQwire.com, P.C.
Contact Information Redacted



International Centre for Expertise ☐ Centre international d'expertise

ICC EXP/459/ICANN/76

**REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION
&
NEW INFORMATION & REPLY TO APPLICANT’S RESPONSE**

gTLD Objector objects to [.band]

Name	.BAND (Application ID: 1-1350-42613)
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**REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION IN REPLY
TO APPLICANTS’ RESPONSES TO OBJECTION**

Objector, pursuant to the Rules for Expertise of the ICC, ICC Practice Note on the Administration of Cases, and Attachment to Module 3 – New gTLD Dispute Resolution Procedure (the “Rules”), hereby requests leave to present an additional submission to address new information, and reply to specific points contained in Applicant’s Response to Objection.

Request for the Panelist’s Acceptance of Objector’s Additional Submission

In accordance with Article 17 of the Attachment to Module 3 the Panelist may accept additional submissions in a time period not to exceed (in the absence of exceptional circumstances) a thirty (30) day period for submissions. Art 17.

Where new information is raised, presented or available, a party should be permitted to submit clarifying or responsive statements in the interest of justice. A Panelist now having been duly appointed and the materials forwarded to the Panelist for consideration, the time for submission and consideration of an Additional Statement is appropriate. Indeed, prior to ICC confirmation and release of the materials to the Panel any submission would be premature. Moreover, the Additional Submission addresses: 1) newly raised information that post-dates the Objection, pertain to, among other things, the ICANN Meeting in Durban; and 2) information raised in Applicants’ Responses.

The New Information & Consolidated Reply below addresses new (post-Objection) statements from the Governmental Advisory Committee (the “GAC”) of ICANN, and also responds to specific points presented in the Responses. Based on the foregoing, Objector submits that there is no prejudice and no undue delay of the proceeding. To avoid delay, and to provide a basis for consideration, the Additional Submission is included below.

In light of the importance of these Objections, and the significant community and public issues at stake, Objector respectfully submits the Consolidated Additional Submission below for the Panelist's consideration and evaluation.

CONSOLIDATED ADDITIONAL SUBMISSION

NEW INFORMATION & REPLY TO APPLICANTS' RESPONSES

1. Government Advisory Community (GAC) Support for .Band as a Sensitive String.

On April 11, 2013, after the filing of the Community Objections, the GAC¹ issued its Beijing Communique that provides, among other things, that:

- a) Sensitive strings (such as music strings) are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm... safeguards should apply to strings that are related to these sectors; Beijing Communique Annex 1, Safeguards on New gTLDs, Category 1, p.8;²
- b) The creation of an appropriate governance structure for sensitive strings by establishing a "working relationship with relevant... bodies" and "developing a strategy to mitigate... risks of fraudulent, and other illegal, activities." Id. at p.8; and
- c) In those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information. Beijing Communique at p.4

This Objection - based on a collective and clear music community opinion - should be upheld especially because ICANN's New gTLD Program Committee considered these points and responded by accepting this important GAC advice³ and addressing the need for added safeguards.⁴ GAC has identified music-themed gTLDs as sensitive strings and notes that opinions of any relevant community (especially those in a contention set), to be strongly taken into consideration. Music-themed strings, "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm" and should have "new strengthened safeguards."

¹ <https://gacweb.icann.org/display/gacweb/About+The+GAC>, "The GAC's key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements. GAC is regularly attended by approximately 50 national governments, distinct economies, and global organizations such as the ITU, UNESCO, the World Intellectual Property Organization (WIPO), INTERPOL and regional organizations such as the OECD, Asia Pacific Forum, and Council of Europe"

² In its Beijing Communique advice to ICANN, GAC has identified music-themed gTLDs (.music, .song, .tunes and .band) as sensitive strings to which enhanced safeguards should apply to, https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf, GAC Communique – Beijing, PRC, dated April 11, 2013.

³ <https://www.icann.org/en/news/correspondence/crocker-to-dryden-06jun13-en.pdf>, Letter from ICANN to GAC RE: Beijing Advice, Annex 1, GAC Register #5, P.11

⁴ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>, NGPC Approved Resolutions, dated June 25th, 2013

Objector, ICANN, and GAC share a similar concern that allowing sensitive, open music-themed applications to proceed without appropriate safeguards⁵ and community governance structure assuring no conflicts of interest could produce material harm especially given the semantic importance, sensitivity and popularity of a music-themed string. On June 26, 2013, Senator Rockefeller, in his capacity as Chairman United States Senate Committee on Commerce, Science & Transportation, urged ICANN to carefully consider the GAC advice and the proposed safeguards.⁶

Furthermore, on July 17, 2013, at the Durban Meeting, the GAC re-addressed these points, stating that there should be a preference for “all applications which have demonstrable community support” and noted “community concerns over the high costs for pursuing a Community Objection process.”⁷ See Final GAC Communique Durban, Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6). The GAC also urged ICANN “to take better account of community views, and improve outcomes for communities, within the existing framework.” Id.

Globally recognized and highly credible associations strongly associated with the creative communities – whose business models are dependent on copyright protection and monetization – also have voiced serious concerns⁸ that there will be a likelihood of material harm without appropriate enhanced safeguards in place. These highly relevant opinions serve as additional evidence that there will be a strong likelihood of harm if enhanced safeguards are missing from an open sensitive string such as .BAND.

2. Objector Satisfies ICANN's Community Definitions and Criteria Background.

ICANN's definitions pertaining to Community are clear and Objector satisfies each of the following definitions:

“Community” is defined as “meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest.”⁹ Here, the common interest shared by the community is clear: the “promotion and distribution of legal music.” Objector is the “advocate” for “independent music.”¹⁰ Objector's Members look to it to protect their (the independent music community's) interests;

“Delineation” Under the AGB, Module 3.2.2.4, “delineation” relates to having “mechanisms for participation,” “institutional purpose,” and “boundaries.”¹¹ Moreover, under AGB Module 4.2.3 “delineation” relates to “clear and straight-forward membership.”¹² A2IM's membership is clear and straight-forward,¹³ and only globally-recognized institutions with core activities relating to the promotion and distribution of legal music are eligible for membership. Additionally, Objector's Members have clear and straight-forward membership criteria for their members with high level,

⁵ Coalition for Online Accountability Memorandum to ICANN

http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁶ U.S. Senate Committee on Commerce, Science & Transportation Letter to ICANN, dated June 26th, 2013

http://images.politico.com/global/2013/06/26/rockefeller_letter_to_icann.pdf

⁷ Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6).

https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2,

⁸ See Comments to GAC Advice <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/>

⁹ AGB Definitions Module 4-11 <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹⁰ Objector's Mission <http://a2im.org/mission/>

¹¹ See AGB Module at 3-7 <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

¹² See AGB Module at 4-11 <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹³ Objector's Membership Summary <http://a2im.org/about-joining/>

formal boundaries e.g. (i) DotMusic's Music Community Member Organization ("MCMO") membership is limited to globally-recognized organizations involved in the promotion and distribution of legal music.¹⁴ (ii) Reverbnation¹⁵ and CDBaby¹⁶ have clearly, defined membership criteria with high level, formal boundaries.

"Size" and "Substantial Opposition" ICANN's definition of "Size" and "Substantial Opposition" relates to "a significant portion of the community"¹⁷ – i.e. not the entire community - "that may be explicitly or implicitly targeted." Substantial opposition should be taken within "context rather than on absolute numbers"¹⁸ of a substantial portion of the community. In 2012 there were 42,100 employed musicians¹⁹ in the U.S, a country which represents 58% of the global digital music market²⁰ and 27% of the global music market share.²¹ In this context, some of A2IM members alone represent a significant portion of the global community e.g. Reverbnation (3m artists)²² or CDBaby (largest online independent music distributor²³ with 300k artists).²⁴

Applicants' arguments against Objector's standing also ignores A2IM Associate Members entirely, including one of Applicant's largest competitors, Apple iTunes,²⁵ and another example of a group with "clear membership" with "formal boundaries, geographic reach and size."²⁶ iTunes accounts for 63% of global digital music market²⁷ – a majority - with 575 million active global members²⁸ who have downloaded 25 billion songs from iTunes catalog of over 26 million songs, available in 119 countries. Furthermore, iTunes is global and agnostic of a musician's territory and whether they are unsigned, independent or in a major label.²⁹

Objector's Members were advised of the Objector's concerns and the concerns were made public and also circulated to Members.³⁰ Objector has been vocal about the concerns raised in the Objection and its Board approved the filing of the Objection. As the representative, indeed, the stated and recognized advocate of its Members, Objector has the authority to act on their behalf. Accordingly, Objector has standing and its concerns are properly set before Panel.

3. Objector and its Representative Entities Have a Substantial Global Reach

In Response, Applicants ignore the far geographical reach of Objector and its Members who, while diverse, share one common goal: the "promotion and distribution of legal music." Even a cursory review of Objector's website and stated policies demonstrates that its members are comprised of both "Label Members" and "Associate Members."³¹ The Responses ignore the relevance of A2IM Associate Members.³² As set forth below, Objector and its Members enjoy

¹⁴ <http://music.us/mission.htm#community-member-organization-cmo>, MCMOs: <http://music.us/supporters.htm>

¹⁵ http://www.reverbnation.com/main/terms_and_conditions#top

¹⁶ <http://members.cdbaby.com/membercontract.aspx>

¹⁷ <https://community.icann.org/display/newgtldrg/community+objection+grounds>

¹⁸ <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>, Module 4-11

¹⁹ U.S Department of Labor Statistics, <http://www.bls.gov/oes/current/oes272042.htm>

²⁰ <http://www.billboard.com/biz/articles/news/digital-and-mobile/1556590/ifpi-2013-recording-industry-in-numbers-global-revenue>

²¹ http://www.ifpi.org/content/section_resources/rin/RIN_Content.html

²² <http://www.reverbnation.com/>

²³ <http://finance.yahoo.com/news/cd-baby-partners-leading-media-090000860.html>

²⁴ <http://members.cdbaby.com/aboutcdbaby.aspx>

²⁵ <http://a2im.org/groups/itunes>

²⁶ <http://www.apple.com/legal/internet-services/itunes/ww/index.html>

²⁷ <http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share>

²⁸ <http://appleinsider.com/articles/13/06/14/apple-now-adding-500000-new-itunes-accounts-per-day>

²⁹ <http://www.apple.com/pr/brary/2013/02/06/iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>

³⁰ Objector's Posted Comments March, 2011-2013 RE: ICANN and music-themed string concerns <http://a2im.org/tag/icann/>

³¹ Objector's Membership Summary <http://a2im.org/about-joining/>

³² Objector's Associate Membership http://a2im.org/contents/?taxonomy=c_sitewide_group&term=associate

significant public recognition as the leading participants in and voices of the global music community – in many cases Objector’s Members have decades of experience and recognition in developing and promoting music interests. Since 2011, A2IM has been publicly open and transparent in its emails and public correspondence to its Members in relation to ICANN-related affairs³³ and concerns over new gTLDs and music-themed gTLDs,³⁴ including notable mentions in the established music industry trade publication Billboard on the topic of music-themed gTLDs.³⁵ For the reasons set forth below, Objector’s standing as a representative and advocate for a significant portion of the music community is clear.

a) *Objector and its Members Are Recognized for International Representation of Musicians’ Rights & Interests.*

Objector’s “Mission & Objectives” are to serve as a voice for the “Independent music community” representing a significant portion of the U.S market. Its “Objectives” include, but are not limited to, supporting music internationally through “multilateral trade agreements” and to “promote international visibility” of the Independent Music Sector in the “global marketplace.” To that end, Objector’s participation and recognition by the U.S Government as an important advocate for international music trade activities³⁶ counters Applicant’s assertions. A2IM members also include highly relevant music entities linked to global governments, such as France (BureauExport³⁷), China (China Audio Video Association³⁸) and Germany (Initiative Musik supporting German music).³⁹ These three A2IM members alone (together with U.S market) represent substantial music economies and a significant portion of the community.

Objector is strongly associated with numerous recognized and delineated global music coalitions,⁴⁰ the Coalition for Online Accountability,⁴¹ and national coalitions such as MusicUnited.⁴² A2IM affiliates,⁴³ such as the MusicFirst Coalition,⁴⁴ the Copyright Alliance,⁴⁵ and the World Independent Network (WIN).⁴⁶ Through these affiliations and associations Objector demonstrates it is an established institution strongly associated with the string and a global “substantial and clearly delineated community.”

b) *DotMusic Limited is a Member of Objector and its Community Overlaps A2IM*

Objector and its Members believe that music-themed strings best serve the interests of the community under a multi-stakeholder governance model to eliminate strong conflict of interest likelihood. Moreover, many A2IM members are supporting organizations and related entities to

³³ Objector’s Posted Comments March, 2011-2013 RE: ICANN and New gTLD Concerns <http://a2im.org/tag/icann/>

³⁴ <http://a2im.org/2013/02/04/call-to-action-please-write-icaan-about-how-music-should-be-administered/>

³⁵ <http://www.billboard.com/biz/articles/news/1176863/fight-over-music-domain-approvals-continue>

³⁶ U.S Government International Trade Commission, <http://www.usitc.gov/publications/332/pub4393.pdf>, 3-9 and C-3, <http://www.usitc.gov/search-ui/search/C.view=default/results?s=&sa=0&hf=20&q=A2IM>, May 2013

³⁷ <http://a2im.org/groups/french-music-export-office>

³⁸ <http://a2im.org/groups/china-audio-video-association-cava>

³⁹ <http://a2im.org/groups/initiative-musik-gmbh>

⁴⁰ <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdf/JAXI5xkyLm.pdf>

⁴¹ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁴² http://www.musicunited.org/1_whocares.aspx

⁴³ http://a2im.org/contents/?taxonomy=c_sitewide_group&term=associate

⁴⁴ musicFIRST Coalition, with founding members A2IM, RIAA, and The Recording Academy (Grammys), represents musicians, recording artists, managers, music businesses and performance right advocates. The Coalition expanded their unanimous music industry support to include dozens of partner organizations and groups supporting a performance right, <http://www.musicfirstcoalition.org/coalition>

⁴⁵ <http://www.copyrightalliance.org/members>

⁴⁶ <http://winformusic.org/win-members/>

DotMusic, also an A2IM member.⁴⁷ Accordingly DotMusic's voice - as an A2IM member - and its global supporting MCMO members⁴⁸ (See "Other Related Objector Entities" supporting Objector to demonstrate Objector's standing per ICC Rules (emphasis added) in Appendix) - which also overlap with A2IM - is relevant to this Objection. DotMusic MCMO members are strongly associated with a substantial portion of the global music community: the only recognized international federation representing arts councils and governments ministries of culture from 72 countries ("IFACCA"); digital music distributors accounting for a significant majority of all music distributed on legal music stores globally; country-led music coalitions; international music export offices; and the only recognized international association representing music information centers from 37 countries.

As an A2IM Member, DotMusic's MCMO members are, by definition, represented by A2IM. This association "ties" A2IM with DotMusic's clearly delineated music community⁴⁹ including its nexus with string. With respect to "Size," DotMusic's digital music distributor MCMOs (nearly all of whom are A2IM Members): (i) Ingrooves – an A2IM member - is associated⁵⁰ with the major (non-independent) Universal Music Group (Universal has 32.8% music market); (ii) TheOrchard is associated⁵¹ with the major Sony Music (Sony Music has 29.1% music market share⁵²); (iii) Tunecore, with over 500,000,000 sales, distributes more music in one month than all major labels have combined in 100 years.⁵³ Another MCMO, LyricFind, is associated with the content licensing of 2,000 music publishers, including all four majors: EMI Music Publishing, Universal Music Publishing, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing.⁵⁴

Objector, and its Members and Affiliates, meet the ICANN objector criteria as publicly and internationally recognized, established institutions with ongoing relationships with a clearly delineated music community⁵⁵ and a common, shared interest focused on the global "promotion and distribution of legal music." Accordingly, Objector has established its standing and substantial opposition to the Application.

4. Open gTLDs Associated with Sensitive Strings Lacking Pro-Active Policies and Appropriate Enhanced Safeguards⁵⁶ will Create Material Harm and Abuse.

Many new reports emphasize the clear likelihood of material harm that could arise from open sensitive music-themed strings:

- a) Namesentry's recent Anti-Abuse TLD Report supports finding that restricted (i.e. community based) TLDs are safer than open TLDs.⁵⁷

⁴⁷ <http://a2im.org/groups/music-us>

⁴⁸ <http://www.music.us/supporters.htm>

⁴⁹ <http://www.music.us/supporters.htm>

⁵⁰ <http://www.universalmusic.com/corporate/detail/544>

⁵¹ <http://www.billboard.com/biz/articles/news/1098586/orchard-ioda-merging-sony-music-to-invest-in-new-company-sources>

⁵² <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>

⁵³ <http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html>

⁵⁴ <http://www.lyricfind.com/about-lyricfind/>

⁵⁵ 3.5.4 - <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

⁵⁶ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 6, Section 5, July 2013

⁵⁷ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

- b) Verisign, the credible and recognized operator of .COM, recently warned about the “far-reaching and long-lasting residual implications” on the global DNS and voiced its concerns over the “operational readiness for gTLD Registries” – in this case Portfolio applicants – and risks relating to “privacy, trust, confidence, or the overall security of the DNS” resulting in “large scale security and stability issues and hard-to-diagnose corner cases where consumer expectations are unaddressed or users are provided an unsafe or otherwise less than desirable experience.”⁵⁸
- c) The recent re-launch of .PW by Directi (Parent company of .MUSIC Applicant DotMusic Inc.) as an open string - with nearly identical open policies as its .MUSIC application with ID 1-1058-25065 - serves as another strong indicator about the certainty of material harm in the case of open, sensitive and highly popular music-themed gTLDs. According to Symantec, .PW jumped to #4 in Symantec’s TLD spam security rankings.⁵⁹ It was stated that almost 50% of all spam URLs contained .pw.⁶⁰, and Namesentry’s Anti-Abuse Report also confirms .PW as the most abused TLD this year.⁶¹ Experts warned that, despite the .PW registry, Directi, having “a fine set of rules forbidding spam and other evil” effectively-scaling compliance manually was unmanageable. Reactionary policies alone are vulnerable to increased compliance cases. The case of .PW “should be a lesson” for new open TLDs that managing abuse is no easy feat.⁶² Experts agree that open gTLD policies for sensitive strings compromise both trust and mitigating abuse the “problem is that they are reactive, as opposed to proactive.”⁶³

5. The 1998 Digital Millennium Copyright Act (DMCA) and 2001 European Copyright Directive (EDEC) Laws are Outdated, Ineffective and Not Global.

In context of the Objection, the ineffectiveness of the DMCA and European Directive copyright laws to address rampant online copyright infringement/piracy, the lack of appropriate and pro-active enhanced safeguards for music-themed strings will result in material abuse, piracy, cybersquatting, spamming, economic and reputational harm i.e. interference with the music community's core activities.⁶⁴ These repercussions are unquestionably predictable considering the size and popularity of music and the community’s history of widespread online infringement and vulnerability to a higher risk of online abuse.”⁶⁵

⁵⁸ New gTLD Security and Stability Considerations, www.verisigninc.com/assets/gtld-ssr-v2.1-final.pdf and <http://www.sec.gov/Archives/edgar/data/1014473/000101447313000012/form8-k32813xex992.htm>, 2013, Pg. 1 and Pg. 6

⁵⁹ <http://www.symantec.com/connect/blogs/rise-pw-urls-spam-messages>

⁶⁰ <http://www.technewsworld.com/story/78073.html>

⁶¹ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

⁶² John Levine (Spam Expert), <http://jl.ly/Email/palau.html> and <http://jl.ly/Email/pwnope.html>

⁶³ Thomas Barrett, President of registrar Encirca

http://www.circleid.com/posts/20130530_role_of_trust_in_determining_a_new_tlds_business_success/

⁶⁴ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 4, Section 3, July 2013

⁶⁵ Music Coalition letter to ICANN, <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/msg00092.html> (<http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdf/JAXI5xkyLm.pdf>)

6. **Applicants Should Be Evaluated Based on their Applications**

The Applications in question should be evaluated based on only policies and facts contained in the respective Applications. Promises by Applicants of “plans” to implement policies to address concerns found in their Application or to circumvent the Objection are neither contractually binding nor permitted. New measures and statements not contained in the Application and, which effect 3rd-parties and contention sets should be deemed material changes. To hold otherwise would create an unfair precedent and allow applicants to circumvent otherwise inadequate applications, with broad statements of intended plans of action. Per ICANN, failure to notify ICANN of any material change would render any information provided in the application false or misleading and could result in denial of the application. See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7.

In the context of this string, such changes should “be construed as unfair,” because they would “affect string contention,” and “affect other third parties materially,”⁶⁶ such as community applicants that already submitted Applications that have appropriate restrictions and enhanced safeguards included and specifically enumerated in their Applications. Any abstract statements by Applicants pertaining to future plans to implement new policies/measures or to implement any new ICANN gTLD Application policy changes not clearly described in Application should be deemed material changes. Accordingly, the Panel should evaluate the Objection and the Applicants’ policies or lack thereof based on the four-corners of a particular Application.

Conclusion

It is respectfully submitted that the Applicants applied-for music-themed string gTLD lack the appropriate pro-active enhanced safeguards required for such a sensitive string to prevent highly probable risks, illegal activities and abuses which materially harm the community and compromise consumer protection. The music-themed gTLD is properly served by a multi-stakeholder community-based governance model that ensures there are no conflicts of interests and the music-themed strings are launched in the global public interest and serve the entire music community not one corporate entity and its intended conflicted financial interests.

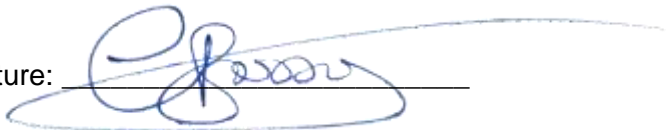
Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)

A copy of this Request for Leave to File Additional Submission in Reply to Applicant’s Response to the Objection is/was transmitted to the Applicant on: August 12, 2013 by email to the following address: Contact Information Redacted

Respectfully submitted:

Date: August 12, 2013

Signature: _____



Constantinos Roussos
DotMusic

⁶⁶ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7



International Centre for Expertise ☐ Centre international d'expertise

ICC EXP/460/ICANN/77

REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION & NEW INFORMATION & REPLY TO APPLICANT'S RESPONSE

gTLD Objector objects to [.band]

Name	.BAND (Application ID: 1-856-54878)
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REQUEST FOR LEAVE TO FILE ADDITIONAL SUBMISSION IN REPLY TO APPLICANTS' RESPONSES TO OBJECTION

Objector, pursuant to the Rules for Expertise of the ICC, ICC Practice Note on the Administration of Cases, and Attachment to Module 3 – New gTLD Dispute Resolution Procedure (the “Rules”), hereby requests leave to present an additional submission to address new information, and reply to specific points contained in Applicant’s Response to Objection.

Request for the Panelist’s Acceptance of Objector’s Additional Submission

In accordance with Article 17 of the Attachment to Module 3 the Panelist may accept additional submissions in a time period not to exceed (in the absence of exceptional circumstances) a thirty (30) day period for submissions. Art 17.

Where new information is raised, presented or available, a party should be permitted to submit clarifying or responsive statements in the interest of justice. A Panelist now having been duly appointed and the materials forwarded to the Panelist for consideration, the time for submission and consideration of an Additional Statement is appropriate. Indeed, prior to ICC confirmation and release of the materials to the Panel any submission would be premature. Moreover, the Additional Submission addresses: 1) newly raised information that post-dates the Objection, pertain to, among other things, the ICANN Meeting in Durban; and 2) information raised in Applicants’ Responses.

The New Information & Consolidated Reply below addresses new (post-Objection) statements from the Governmental Advisory Committee (the “GAC”) of ICANN, and also responds to specific points presented in the Responses. Based on the foregoing, Objector submits that there is no prejudice and no undue delay of the proceeding. To avoid delay, and to provide a basis for consideration, the Additional Submission is included below.

In light of the importance of these Objections, and the significant community and public issues at stake, Objector respectfully submits the Consolidated Additional Submission below for the Panelist's consideration and evaluation.

CONSOLIDATED ADDITIONAL SUBMISSION

NEW INFORMATION & REPLY TO APPLICANTS' RESPONSES

1. Government Advisory Community (GAC) Support for .Band as a Sensitive String.

On April 11, 2013, after the filing of the Community Objections, the GAC¹ issued its Beijing Communique that provides, among other things, that:

- a) Sensitive strings (such as music strings) are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm... safeguards should apply to strings that are related to these sectors; Beijing Communique Annex 1, Safeguards on New gTLDs, Category 1, p.8;²
- b) The creation of an appropriate governance structure for sensitive strings by establishing a "working relationship with relevant... bodies" and "developing a strategy to mitigate... risks of fraudulent, and other illegal, activities." Id. at p.8; and
- c) In those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information. Beijing Communique at p.4

This Objection - based on a collective and clear music community opinion - should be upheld especially because ICANN's New gTLD Program Committee considered these points and responded by accepting this important GAC advice³ and addressing the need for added safeguards.⁴ GAC has identified music-themed gTLDs as sensitive strings and notes that opinions of any relevant community (especially those in a contention set), to be strongly taken into consideration. Music-themed strings, "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm" and should have "new strengthened safeguards."

¹ <https://gacweb.icann.org/display/gacweb/About+The+GAC>, "The GAC's key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements. GAC is regularly attended by approximately 50 national governments, distinct economies, and global organizations such as the ITU, UNESCO, the World Intellectual Property Organization (WIPO), INTERPOL and regional organizations such as the OECD, Asia Pacific Forum, and Council of Europe"

² In its Beijing Communique advice to ICANN, GAC has identified music-themed gTLDs (.music, .song, .tunes and .band) as sensitive strings to which enhanced safeguards should apply to, https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf, GAC Communique – Beijing, PRC, dated April 11, 2013.

³ <https://www.icann.org/en/news/correspondence/crocker-to-dryden-06jun13-en.pdf>, Letter from ICANN to GAC RE: Beijing Advice, Annex 1, GAC Register #5, P.11

⁴ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>, NGPC Approved Resolutions, dated June 25th, 2013

Objector, ICANN, and GAC share a similar concern that allowing sensitive, open music-themed applications to proceed without appropriate safeguards⁵ and community governance structure assuring no conflicts of interest could produce material harm especially given the semantic importance, sensitivity and popularity of a music-themed string. On June 26, 2013, Senator Rockefeller, in his capacity as Chairman United States Senate Committee on Commerce, Science & Transportation, urged ICANN to carefully consider the GAC advice and the proposed safeguards.⁶

Furthermore, on July 17, 2013, at the Durban Meeting, the GAC re-addressed these points, stating that there should be a preference for “all applications which have demonstrable community support” and noted “community concerns over the high costs for pursuing a Community Objection process.”⁷ See Final GAC Communiqué Durban, Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6). The GAC also urged ICANN “to take better account of community views, and improve outcomes for communities, within the existing framework.” Id.

Globally recognized and highly credible associations strongly associated with the creative communities – whose business models are dependent on copyright protection and monetization – also have voiced serious concerns⁸ that there will be a likelihood of material harm without appropriate enhanced safeguards in place. These highly relevant opinions serve as additional evidence that there will be a strong likelihood of harm if enhanced safeguards are missing from an open sensitive string such as .BAND.

2. Objector Satisfies ICANN's Community Definitions and Criteria Background.

ICANN's definitions pertaining to Community are clear and Objector satisfies each of the following definitions:

“Community” is defined as “meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest.”⁹ Here, the common interest shared by the community is clear: the “promotion and distribution of legal music.” Objector is the “advocate” for “independent music.”¹⁰ Objector's Members look to it to protect their (the independent music community's) interests;

“Delineation” Under the AGB, Module 3.2.2.4, “delineation” relates to having “mechanisms for participation,” “institutional purpose,” and “boundaries.”¹¹ Moreover, under AGB Module 4.2.3 “delineation” relates to “clear and straight-forward membership.”¹² A2IM's membership is clear and straight-forward,¹³ and only globally-recognized institutions with core activities relating to the promotion and distribution of legal music are eligible for membership. Additionally, Objector's Members have clear and straight-forward membership criteria for their members with high level,

⁵ Coalition for Online Accountability Memorandum to ICANN

http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁶ U.S. Senate Committee on Commerce, Science & Transportation Letter to ICANN, dated June 26th, 2013

http://images.politico.com/global/2013/06/26/rockefeller_letter_to_icann.pdf

⁷ Section IV, GAC Advice to Board, 1.1.a.1 (P.3) and 7b (P.6).

https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2,

⁸ See Comments to GAC Advice <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/>

⁹ AGB Definitions Module 4-11 <http://newgtlds.icann.org/en/applicants/agg/string-contention-procedures-04jun12-en.pdf>

¹⁰ Objector's Mission <http://a2im.org/mission/>

¹¹ See AGB Module at 3-7 <http://newgtlds.icann.org/en/applicants/agg/objection-procedures-04jun12-en.pdf>

¹² See AGB Module at 4-11 <http://newgtlds.icann.org/en/applicants/agg/string-contention-procedures-04jun12-en.pdf>

¹³ Objector's Membership Summary <http://a2im.org/about-joining/>

formal boundaries e.g. (i) DotMusic's Music Community Member Organization ("MCMO") membership is limited to globally-recognized organizations involved in the promotion and distribution of legal music.¹⁴ (ii) Reverbnation¹⁵ and CDBaby¹⁶ have clearly, defined membership criteria with high level, formal boundaries.

"Size" and "Substantial Opposition" ICANN's definition of "Size" and "Substantial Opposition" relates to "a significant portion of the community"¹⁷ – i.e. not the entire community - "that may be explicitly or implicitly targeted." Substantial opposition should be taken within "context rather than on absolute numbers"¹⁸ of a substantial portion of the community. In 2012 there were 42,100 employed musicians¹⁹ in the U.S, a country which represents 58% of the global digital music market²⁰ and 27% of the global music market share.²¹ In this context, some of A2IM members alone represent a significant portion of the global community e.g. Reverbnation (3m artists)²² or CDBaby (largest online independent music distributor²³ with 300k artists).²⁴

Applicants' arguments against Objector's standing also ignores A2IM Associate Members entirely, including one of Applicant's largest competitors, Apple iTunes,²⁵ and another example of a group with "clear membership" with "formal boundaries, geographic reach and size."²⁶ iTunes accounts for 63% of global digital music market²⁷ – a majority - with 575 million active global members²⁸ who have downloaded 25 billion songs from iTunes catalog of over 26 million songs, available in 119 countries. Furthermore, iTunes is global and agnostic of a musician's territory and whether they are unsigned, independent or in a major label.²⁹

Objector's Members were advised of the Objector's concerns and the concerns were made public and also circulated to Members.³⁰ Objector has been vocal about the concerns raised in the Objection and its Board approved the filing of the Objection. As the representative, indeed, the stated and recognized advocate of its Members, Objector has the authority to act on their behalf. Accordingly, Objector has standing and its concerns are properly set before Panel.

3. Objector and its Representative Entities Have a Substantial Global Reach

In Response, Applicants ignore the far geographical reach of Objector and its Members who, while diverse, share one common goal: the "promotion and distribution of legal music." Even a cursory review of Objector's website and stated policies demonstrates that its members are comprised of both "Label Members" and "Associate Members."³¹ The Responses ignore the

¹⁴ <http://music.us/mission.htm#community-member-organization-cmo>, MCMOs: <http://music.us/supporters.htm>

¹⁵ http://www.reverbnation.com/main/terms_and_conditions#top

¹⁶ <http://members.cdbaby.com/membercontract.aspx>

¹⁷ <https://community.icann.org/display/newgtldrg/community+objection+grounds>

¹⁸ <http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>, Module 4-11

¹⁹ U.S Department of Labor Statistics, <http://www.bls.gov/oes/current/oes272042.htm>

²⁰ <http://www.billboard.com/biz/articles/news/digital-and-mobile/1556590/ifpi-2013-recording-industry-in-numbers-global-revenue>

²¹ http://www.ifpi.org/content/section_resources/rin/RIN_Content.html

²² <http://www.reverbnation.com/>

²³ <http://finance.yahoo.com/news/cd-baby-partners-leading-media-090000860.html>

²⁴ <http://members.cdbaby.com/aboutcdbaby.aspx>

²⁵ <http://a2im.org/groups/itunes>

²⁶ <http://www.apple.com/legal/internet-services/itunes/ww/index.html>

²⁷ <http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share>

²⁸ <http://appleinsider.com/articles/13/06/14/apple-now-adding-500000-new-itunes-accounts-per-day>

²⁹ <http://www.apple.com/pr/brary/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>

³⁰ Objector's Posted Comments March, 2011-2013 RE: ICANN and music-themed string concerns <http://a2im.org/tag/icann/>

³¹ Objector's Membership Summary <http://a2im.org/about-joining/>

relevance of A2IM Associate Members.³² As set forth below, Objector and its Members enjoy significant public recognition as the leading participants in and voices of the global music community – in many cases Objector’s Members have decades of experience and recognition in developing and promoting music interests. Since 2011, A2IM has been publicly open and transparent in its emails and public correspondence to its Members in relation to ICANN-related affairs³³ and concerns over new gTLDs and music-themed gTLDs,³⁴ including notable mentions in the established music industry trade publication Billboard on the topic of music-themed gTLDs.³⁵ For the reasons set forth below, Objector’s standing as a representative and advocate for a significant portion of the music community is clear.

a) *Objector and its Members Are Recognized for International Representation of Musicians’ Rights & Interests.*

Objector’s “Mission & Objectives” are to serve as a voice for the “Independent music community” representing a significant portion of the U.S market. Its “Objectives” include, but are not limited to, supporting music internationally through “multilateral trade agreements” and to “promote international visibility” of the Independent Music Sector in the “global marketplace.” To that end, Objector’s participation and recognition by the U.S Government as an important advocate for international music trade activities³⁶ counters Applicant’s assertions. A2IM members also include highly relevant music entities linked to global governments, such as France (BureauExport³⁷), China (China Audio Video Association³⁸) and Germany (Initiative Musik supporting German music).³⁹ These three A2IM members alone (together with U.S market) represent substantial music economies and a significant portion of the community.

Objector is strongly associated with numerous recognized and delineated global music coalitions,⁴⁰ the Coalition for Online Accountability,⁴¹ and national coalitions such as MusicUnited.⁴² A2IM affiliates,⁴³ such as the MusicFirst Coalition,⁴⁴ the Copyright Alliance,⁴⁵ and the World Independent Network (WIN).⁴⁶ Through these affiliations and associations Objector demonstrates it is an established institution strongly associated with the string and a global “substantial and clearly delineated community.”

b) *DotMusic Limited is a Member of Objector and its Community Overlaps A2IM*

Objector and its Members believe that music-themed strings best serve the interests of the community under a multi-stakeholder governance model to eliminate strong conflict of interest

³² Objector’s Associate Membership http://a2im.org/contents/?taxonomy=c_site%20wide_group&term=associate

³³ Objector’s Posted Comments March, 2011-2013 RE: ICANN and New gTLD Concerns <http://a2im.org/tag/icann/>

³⁴ <http://a2im.org/2013/02/04/call-to-action-please-write-icaan-about-how-music-should-be-administered/>

³⁵ <http://www.billboard.com/biz/articles/news/1176863/fight-over-music-domain-approvals-continue>

³⁶ U.S Government International Trade Commission, <http://www.usitc.gov/publications/332/pub4393.pdf>, 3-9 and C-3,

<http://www.usitc.gov/search-ui/search/C.view=default/results?s=&sa=0&hf=20&q=A2IM>, May 2013

³⁷ <http://a2im.org/groups/french-music-export-office>

³⁸ <http://a2im.org/groups/china-audio-video-association-cava>

³⁹ <http://a2im.org/groups/initiative-musik-gmbh>

⁴⁰ <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdfJAXI5xkyLm.pdf>

⁴¹ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

⁴² http://www.musicunited.org/1_whocares.aspx

⁴³ http://a2im.org/contents/?taxonomy=c_site%20wide_group&term=associate

⁴⁴ musicFIRST Coalition, with founding members A2IM, RIAA, and The Recording Academy (Grammys), represents musicians, recording artists, managers, music businesses and performance right advocates. The Coalition expanded their unanimous music industry support to include dozens of partner organizations and groups supporting a performance right,

<http://www.musicfirstcoalition.org/coalition>

⁴⁵ <http://www.copyrightalliance.org/members>

⁴⁶ <http://winformusic.org/win-members/>

likelihood. Moreover, many A2IM members are supporting organizations and related entities to DotMusic, also an A2IM member.⁴⁷ Accordingly DotMusic's voice - as an A2IM member - and its global supporting MCMO members⁴⁸ (See "Other Related Objector Entities" supporting Objector to demonstrate Objector's standing per ICC Rules (emphasis added) in Appendix) - which also overlap with A2IM - is relevant to this Objection. DotMusic MCMO members are strongly associated with a substantial portion of the global music community: the only recognized international federation representing arts councils and governments ministries of culture from 72 countries ("IFACCA"); digital music distributors accounting for a significant majority of all music distributed on legal music stores globally; country-led music coalitions; international music export offices; and the only recognized international association representing music information centers from 37 countries.

As an A2IM Member, DotMusic's MCMO members are, by definition, represented by A2IM. This association "ties" A2IM with DotMusic's clearly delineated music community⁴⁹ including its nexus with string. With respect to "Size," DotMusic's digital music distributor MCMOs (nearly all of whom are A2IM Members): (i) Ingrooves – an A2IM member - is associated⁵⁰ with the major (non-independent) Universal Music Group (Universal has 32.8% music market); (ii) TheOrchard is associated⁵¹ with the major Sony Music (Sony Music has 29.1% music market share⁵²); (iii) Tunecore, with over 500,000,000 sales, distributes more music in one month than all major labels have combined in 100 years.⁵³ Another MCMO, LyricFind, is associated with the content licensing of 2,000 music publishers, including all four majors: EMI Music Publishing, Universal Music Publishing, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing.⁵⁴

Objector, and its Members and Affiliates, meet the ICANN objector criteria as publicly and internationally recognized, established institutions with ongoing relationships with a clearly delineated music community⁵⁵ and a common, shared interest focused on the global "promotion and distribution of legal music." Accordingly, Objector has established its standing and substantial opposition to the Application.

4. Open gTLDs Associated with Sensitive Strings Lacking Pro-Active Policies and Appropriate Enhanced Safeguards⁵⁶ will Create Material Harm and Abuse.

Many new reports emphasize the clear likelihood of material harm that could arise from open sensitive music-themed strings:

- a) Namesentry's recent Anti-Abuse TLD Report supports finding that restricted (i.e. community based) TLDs are safer than open TLDs.⁵⁷

⁴⁷ <http://a2im.org/groups/music-us>

⁴⁸ <http://www.music.us/supporters.htm>

⁴⁹ <http://www.music.us/supporters.htm>

⁵⁰ <http://www.universalmusic.com/corporate/detail/544>

⁵¹ <http://www.billboard.com/biz/articles/news/1098586/orchard-ioda-merging-sony-music-to-invest-in-new-company-sources>

⁵² <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012>

⁵³ <http://blog.tunecore.com/2012/02/what-the-riaa-wont-tell-you-tunecores-response-to-the-ny-times-op-ed-by-the-riaa-ceo-cary-h-sherman.html>

⁵⁴ <http://www.lyricfind.com/about-lyricfind/>

⁵⁵ 3.5.4 - <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

⁵⁶ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 6, Section 5, July 2013

⁵⁷ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

- b) Verisign, the credible and recognized operator of .COM, recently warned about the “far-reaching and long-lasting residual implications” on the global DNS and voiced its concerns over the “operational readiness for gTLD Registries” – in this case Portfolio applicants – and risks relating to “privacy, trust, confidence, or the overall security of the DNS” resulting in “large scale security and stability issues and hard-to-diagnose corner cases where consumer expectations are unaddressed or users are provided an unsafe or otherwise less than desirable experience.”⁵⁸
- c) The recent re-launch of .PW by Directi (Parent company of .MUSIC Applicant DotMusic Inc.) as an open string - with nearly identical open policies as its .MUSIC application with ID 1-1058-25065 - serves as another strong indicator about the certainty of material harm in the case of open, sensitive and highly popular music-themed gTLDs. According to Symantec, .PW jumped to #4 in Symantec’s TLD spam security rankings.⁵⁹ It was stated that almost 50% of all spam URLs contained .pw.⁶⁰, and Namesentry’s Anti-Abuse Report also confirms .PW as the most abused TLD this year.⁶¹ Experts warned that, despite the .PW registry, Directi, having “a fine set of rules forbidding spam and other evil” effectively-scaling compliance manually was unmanageable. Reactionary policies alone are vulnerable to increased compliance cases. The case of .PW “should be a lesson” for new open TLDs that managing abuse is no easy feat.⁶² Experts agree that open gTLD policies for sensitive strings compromise both trust and mitigating abuse the “problem is that they are reactive, as opposed to proactive.”⁶³

5. The 1998 Digital Millennium Copyright Act (DMCA) and 2001 European Copyright Directive (EDEC) Laws are Outdated, Ineffective and Not Global.

In context of the Objection, the ineffectiveness of the DMCA and European Directive copyright laws to address rampant online copyright infringement/piracy, the lack of appropriate and pro-active enhanced safeguards for music-themed strings will result in material abuse, piracy, cybersquatting, spamming, economic and reputational harm i.e. interference with the music community's core activities.⁶⁴ These repercussions are unquestionably predictable considering the size and popularity of music and the community’s history of widespread online infringement and vulnerability to a higher risk of online abuse.”⁶⁵

⁵⁸ New gTLD Security and Stability Considerations, www.verisigninc.com/assets/gtld-ssr-v2.1-final.pdf and <http://www.sec.gov/Archives/edgar/data/1014473/000101447313000012/form8-k32813xex992.htm>, 2013, Pg. 1 and Pg. 6

⁵⁹ <http://www.symantec.com/connect/blogs/rise-pw-urls-spam-messages>

⁶⁰ <http://www.technewsworld.com/story/78073.html>

⁶¹ <http://architelos.com/wp-content/uploads/2013/07/NameSentry-Report-2013.pdf>, P.4, July 2013

⁶² John Levine (Spam Expert), <http://il.ly/Email/palau.html> and <http://il.ly/Email/pwnope.html>

⁶³ Thomas Barrett, President of registrar Encirca

http://www.circleid.com/posts/20130530_role_of_trust_in_determining_a_new_tlds_business_success/

⁶⁴ DotMusic Report, Why Open Applications for Sensitive, Music-Themed gTLDs Create Material Harm, <http://music.us/dotmusic-open-music-themed-sensitive-gtld-harm-without-safeguards.pdf>, Page 4, Section 3, July 2013

⁶⁵ Music Coalition letter to ICANN, <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/msg00092.html> (<http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdf/JAXI5xkyLm.pdf>)

6. Applicants Should Be Evaluated Based on their Applications

The Applications in question should be evaluated based on only policies and facts contained in the respective Applications. Promises by Applicants of “plans” to implement policies to address concerns found in their Application or to circumvent the Objection are neither contractually binding nor permitted. New measures and statements not contained in the Application and, which effect 3rd-parties and contention sets should be deemed material changes. To hold otherwise would create an unfair precedent and allow applicants to circumvent otherwise inadequate applications, with broad statements of intended plans of action. Per ICANN, failure to notify ICANN of any material change would render any information provided in the application false or misleading and could result in denial of the application. See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7.

In the context of this string, such changes should “be construed as unfair,” because they would “affect string contention,” and “affect other third parties materially,”⁶⁶ such as community applicants that already submitted Applications that have appropriate restrictions and enhanced safeguards included and specifically enumerated in their Applications. Any abstract statements by Applicants pertaining to future plans to implement new policies/measures or to implement any new ICANN gTLD Application policy changes not clearly described in Application should be deemed material changes. Accordingly, the Panel should evaluate the Objection and the Applicants’ polices or lack thereof based on the four-corners of a particular Application.

Conclusion

It is respectfully submitted that the Applicants applied-for music-themed string gTLD lack the appropriate pro-active enhanced safeguards required for such a sensitive string to prevent highly probable risks, illegal activities and abuses which materially harm the community and compromise consumer protection. The music-themed gTLD is properly served by a multi-stakeholder community-based governance model that ensures there are no conflicts of interests and the music-themed strings are launched in the global public interest and serve the entire music community not one corporate entity and its intended conflicted financial interests.

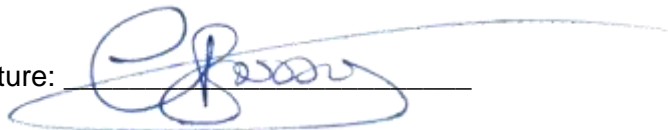
Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)

A copy of this Request for Leave to File Additional Submission in Reply to Applicant’s Response to the Objection is/was transmitted to the Applicant on: August 12, 2013 by email to the following address: Contact Information Redacted

Respectfully submitted:

Date: August 12, 2013

Signature: _____



Constantinos Roussos
DotMusic

⁶⁶ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7