1. Requester Information

Name: Constantinos Roussos

Address:　　Contact Information Redacted

Email:　　Contact Information Redacted

2. Request for Reconsideration of: _X_ Staff action/inaction

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

DotMusic (.MUSIC™) is challenging ICANN's inaction on 5 issues:

1) For approving material change requests in reference to Amazon's exclusive access Applications for .MUSIC[1], .SONG[2] and .TUNES[3] (See Appendix D and E). ICANN failed to apply (let alone balance) the 7 criteria required by the Applicant Guidebook (AGB, Section 1.2.7) to approve a change request[4] and has allowed Amazon to make significant material changes, such as materially altering their mission statement (Question 18) by deleting all exclusive access language. Other relevant changes included Questions 22, 28, 29, 46, 47, 48, 49, and 50. It is noted that Questions 28 (Abuse Prevention and Mitigation), 29 (Rights Protection Mechanism), 46 (Projections Template), 47 (Costs and Capital Expenditures), 48 (Funding and Revenue), 49 (Contingency Planning) and 50 (Funding Critical Registry Functions) are scored points in which Amazon has originally received a score of 2, 2, 1, 2, 2, 2 and 3 respectively (14

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[1] Amazon .MUSIC Application ID 1-1316-18029 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3478?t:ac=966), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3478?t:ac=966)

[2] Amazon .SONG Application ID 1-1317-53837 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3488?t:ac=942), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3488?t:ac=942)

[3] Amazon .TUNES Application ID 1-1317-30761 (Original Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/3494?t:ac=938), Updated Version: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadtodocument/3494?t:ac=938)

[4] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

total scored points) in their original Initial Evaluation scores (See Appendix F). (<u>Point 1</u>);

2) For failing to recognize the material relevance and impact of the <u>exceptional</u> GAC Advice on new binding contractual material changes in the Program arising from GAC Toronto and Beijing Communique and subsequent GAC Category 2 Exclusive Access Advice, related NGPC Resolutions and revisions to the new gTLD Registry Agreement[5] that provide that registry operators of a "generic string" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (2.9(c) of Registry Agreement. (the "Material Changes"). Such changes are material changes to the new gTLD Program which have been accepted by the ICANN NGPC in Resolutions; (<u>Point 2</u>).

3) For failing to take into consideration the significant financial and legal costs imposed on both Legal Rights Objectors[6] and Community Objectors[7] and their corresponding communities who objected against the exclusive access language that was removed by Amazon in its new version of the Applications for .MUSIC, .SONG and .TUNES that was approved by ICANN as a non-material change. Amazon defended its exclusive access language position in all Legal Rights Objections and Community Objections proceedings with the International Chamber of Commerce (ICC) and the World Intellectual Property Organization (WIPO). This material language was deleted in the updated versions of these Applications that were previously objected-to. Amazon's updated Applications have completely deviated from Amazon's position in all of the Objections (relating to .MUSIC, .SONG and .TUNES) by removing the entire language that was objected-to. Without such language such Objections would not have been filed

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[5] 3(c) and 3(d) of Specification 11 provided that: (c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of <u>openness</u> and <u>non-discrimination</u> by establishing, publishing and adhering to clear registration policies. (d) Registry Operator of a "Generic String" TLD <u>may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates"</u> [. . .]. "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things (New gTLD Registry Agreement, July 2nd, 2013, https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d).
[6] http://www.wipo.int/amc/en/domains/lro/
[7] http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination

(emphasis added). Such action by Amazon to remove material language from their .MUSIC, .SONG and .TUNES Applications proves beyond reasonable doubt that Amazon was providing misleading and false information to Panelists and highlights the inappropriateness and material harm their Applications posed to the Objectors consistent with the position of the Objectors.[8] (Point 3);

4) For failing to take into consideration the .MOBILE Expert Determination against Amazon which was upheld[9] (See Appendix A) based on same exclusive access language found in the Applications for .MUSIC, .SONG and .TUNES (which were identical to those for .MOBILE). Amazon's new versions for .MUSIC, .SONG and .TUNES were approved by ICANN despite the critical deletion of the original applications' exclusive access language (While highlighting that the Amazon Application for .MOBILE was an exact match to the .MUSIC, .SONG and .TUNES Amazon Applications). (Point 4); and

5) For failing to take into consideration DotMusic's Re-Consideration Requests[10] (See Appendix B and C) relating to material changes in Amazon's Applications, inconsistent decisions and the provision of misleading, false and self-serving information by Applicants to Panelists to circumvent Objections. Furthermore, ICANN ignored DotMusic's request to invite .music LLC (Applicant for .MUSIC) for a change request after notifying ICANN of Applicant's exclusive access language in their Application and discrepancy between their Response to GAC

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[8] We note that Applicants of 10 applications (not including Amazon) consistently indicated that the applied-for TLDs will still be operated as exclusive access registries and will defend their position (See http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en). In antithesis, Amazon has made a 180-degree change in its position without any accountability for the position it defended in Legal Rights Objections and Community Objections which is now deemed false, misleading and harmful against Objectors made to circumvent the Objections. According to the Applicant Guidebook 1.2.7 (http://newgtlds.icann.org/en/applicants/customer-service/change-requests): "2. 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."

[9] CTIA – The Wireless Association vs. Amazon EU S.A.R.L, http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_499_ICANN_116_Expert-Determination/, April 10, 2014. Also it is noted that a Community Objection against Ralph Lauren's Application for .POLO was upheld (http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_452_ICANN_69_Expert-Determination/) based on similar exclusive access language, further highlighting the material nature of the inclusion or exclusion of such language.

[10] Request 14-8 (https://new.icann.org/en/groups/board/governance/reconsideration/14-8) and Request 13-22 (https://new.icann.org/en/groups/board/governance/reconsideration/13-22).

Category 2 Advice that their Application was not an exclusive access Application in contrast with the actual language in their current Application. The Applicant .music LLC defended their position in their Community Objection and Legal Rights Objection but yet misleadingly indicated to ICANN in their GAC Category 2 Responses that their Application does not have any exclusive access language. It is clear that ICANN is treating certain Applicants differently since both Applicants have exclusive access language in their Applications and only one was invited for a change request while the other Applicant was allowed to circumvent the process. ICANN was already notified that such inaction harms other Applicants in the contention set and Objectors but still decided to ignore its accountability mechanisms and such a reasonable, consistent and transparent request to ensure equal treatment and non-discrimination of Applicants in the new gTLD Program. (Point 5).

4.   Date of action/inaction: May 24th, 2014.

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

May 24th, 2014

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

According to the AGB, Section 1.2.7 on the "New gTLD Application Change Request Process and Criteria," ICANN's Decision Criteria for change requests state:

> Determination of whether changes will be approved will balance the following factors:
>
> 1. *Explanation* – Is a reasonable explanation provided?
> 2. *Evidence that original submission was in error* – Are there indicia to support an assertion that the change merely corrects an error?
> 3. *Other third parties affected* – Does the change affect other third parties materially?

4. ***Precedents*** – Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?
5. ***Fairness to applicants*** – Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
6. ***Materiality*** – Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority consideration?
7. ***Timing*** – Does the timing interfere with the evaluation process in some way? 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. (AGB §1.2.7.)

Note that per section 1.2.7 of the Applicant Guidebook, if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

1. 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.
2. 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.[11]

Amazon deleted all exclusive access language that is found in its original Applications for .MUSIC, .SONG and TUNES. Exclusive language that was removed included:

"The mission of the [.MUSIC/.SONG/.TUNES] registry is: To provide a unique and dedicated platform for Amazon while simultaneously protecting the integrity of its brand and reputation."

"Amazon will continually update the Domain Management Policy as need to reflect Amazon's business goals…"

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[11] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

"All domains in the [.MUSIC/.SONG/.TUNES] registry will remain the property of Amazon"

"[.MUSIC/.SONG/.TUNES] domains may not be delegated or assigned to third party organizations, institutions or individuals."

"There is no foreseeable reason for Amazon to undertake public outreach or mass communication about its new gTLD registry because domains will be provisioned in line with Amazon's business goals."

(See Appendix D and E: Compare Original Amazon Applications to Updated Amazon Applications for .MUSIC, .SONG and .TUNES)

ICANN failed to consider the AGB Decision Factors for admitting change requests for three Amazon Applications: .MUSIC, .SONG and .TUNES. ICANN concluded that these change requests were not material and as a result approved the changes:

These updates were made as a result of ICANN approving an application change request submitted by the applicant. Updates were made to both confidential and non-confidential portions of the application, therefore specific details are not being posted. These updates are available for public comment for 30 days, beginning on the posting date.

(Amazon Application Update History for .MUSIC,[12] .SONG[13] and .TUNES[14])

These material changes were approved despite the preponderance of evidence and knowledge that such deletion of notable exclusive access language would ultimately affect and change scored sections of these Applications, including financial components such as Projections Template (Q.46), Costs and Capital Expenditures (Q.47), Funding and Revenue (Q.48), Contingency Planning (Q.49) and Funding Critical Registry Functions (Q.50).

Changing an Application from an exclusive access registry to a non-exclusive access registry by

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[12] https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/966, April 30, 2014

[13] https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/942, May 1, 2014

[14] https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/938, May 1, 2014

deleting the exclusive access language for each Application <u>materially changes the Application's entire scope and mission</u>. If the original Applications did not include the exclusive access language then there would <u>not</u> be any Objections against Amazon, GAC Early Warnings, GAC Advice against their Exclusive Access language or ICANN NGPC Resolutions prohibiting exclusive access language for generic strings. ICANN is fully aware of this important fact. ICANN is fully aware of the AGB Decision Criteria for change requests since it has rejected many change requests under significantly less conspicuous and minor grounds (emphasis added).

This is abundantly clear in Amazon's updated versions of their Applications for .MUSIC, .SONG and TUNES. Their Application Update History pages indicate that changes were submitted to ICANN and approved, including allowing Amazon to alter their Mission statement (Question 18) which guides all their entire Applications by deleting exclusive access language. Such a material change would have a significant effect on strategy, policies, projections and the financial section of each Application. These sections are scored but yet ICANN did not construe a mission statement change of such magnitude a material change despite Objections, GAC Advice and NGPC Resolutions against Exclusive Access registries for generic strings. To comply with its updated Mission statement, Amazon submitted change requests for all scored sections that would be affected after deleting exclusive access language: Projections Template (Q.46), Costs and Capital Expenditures (Q.47), Funding and Revenue (Q.48), Contingency Planning (Q.49) and Funding Critical Registry Functions (Q.50).

ICANN failed to consider the AGB's change request Decision Factors which determine whether changes will be approved:

1) There was no reasonable *Explanation* provided why such a material change was submitted. Such *Explanation* should also include why Amazon is no longer defending the position it held in Legal Rights Objections and Community

Objections.

2) There is no indication to support an assertion that the change merely corrects an error and any *evidence that original submission was in error*. In contrast, Amazon defended its position in Legal Rights Objections and Community Objections for .MUSIC, .SONG and .TUNES so such an error is impossible to accept.

3) It is without question that there are *other third parties affected*. Significant resources and costs were spent by Legal Rights Objectors and Community Objectors in their cases against Amazon's .MUSIC, .SONG and .TUNES Objections and Amazon's exclusive access language which has been now been deleted, which proves that Amazon mislead Objection Panelists and ICANN with false and misleading information to circumvent the Objection process. Amazon has successfully accomplished circumventing the Objections without any accountability for their new updated changes which showcase that such exclusive language was indeed detrimental and harmful vindicating the Objectors.

4) It is certain that allowing such a material change in an application relating to policies would result in *precedents* and undesirable effects on the program. If such an important policy change is allowed by ICANN then Community Applicants should also be able to request a similar policy change request if they fail to pass Community Priority Evaluation and ask for a re-evaluation of their Application, including re-scoring their Community Priority Evaluation score.

5) It is certain that allowing such a policy-related material change in an application relating to policies would not be construed as *fair to applicants* and the general community. If such an important policy change is allowed by ICANN then Community Applicants should also be able to request a similar policy change request if they fail to pass Community Priority Evaluation (CPE) and ask for a re-evaluation of their Application, including re-scoring their CPE score.

6) It is certain that there is ***materiality*** to the changes that were approved. Deleting exclusive access language from Amazon's Applications results in widespread changes across its Applications and re-scoring of material parts of the Application. In this case, Amazon made changes to sections for Questions 18, 22, 28, 29, 46, 47, 48, 49, and 50. Questions 28 (Abuse Prevention and Mitigation), 29 (Rights Protection Mechanism), 46 (Projections Template), 47 (Costs and Capital Expenditures), 48 (Funding and Revenue), 49 (Contingency Planning) and 50 (Funding Critical Registry Functions) are all scored sections in which Amazon has originally received a score of 2, 2, 1, 2, 2, 2 and 3 respectively in their original Initial Evaluation scores (See Appendix F). A policy change of such significant nature relating to removing exclusive access language in Amazon's Applications will require re-evaluation of each affected section as described. It is clear that such an approved change by ICANN does affect string contention and community priority evaluation as described earlier.

7) It is certain that the ***timing*** interferes with the evaluation process and creates additional delays and inconsistencies. If ICANN agrees to re-evaluate and re-score such material policy changes then it should also allow other applicants – such as Community Applicants with demonstrable support to do the same if they do not receive a satisfactory CPE score and would like to change their Application to fix certain sections to benefit the global public interest in consistent with ICANN Advice to give Community Applicants preferential treatment (See GAC Advice).

Under the same token as Amazon, ICANN did not invite .music LLC to submit a change request (as it did with Amazon) despite its current Application's exclusive access language (e.g having a "sole registry" and only allowing Accredited Associations formed before 2007 ("Affiliates") to offer .music to members (i.e. excluding members of legitimate organizations formed after 2007

or non-"Accredited" Affiliates (See Annex J of DotMusic Reconsideration Request 14-8[15]).

It would be grossly unfair to other Applicants for ICANN to let Amazon or .music LLC "fix" the same concerns expressed by the Objectors without any accountability or repercussions towards the significant resources and costs spent by Objectors to fight against the exclusive access language which is now non-existent in the approved versions. It is obvious that both Amazon and .music LLC have mislead Objection panels with false information to defend their position in order to circumvent the Objection process and have provided ICANN with entirely opposite statements and have convinced ICANN that their updated Applications will have exclusive access language removed despite such action constituting a material change which would lead to the re-evaluation of their Applications at a subsequent round according to the provision of the AGB (Section 1.2.7). Both Applicants had the opportunity to defend the positions they took in the Objections pertaining to exclusive access language but have chosen to ignore such accountability towards the credibility of the new gTLD Program process and use loopholes to circumvent such accountability which ICANN knowingly allowed to proceed at the expense of the global Public Interest and the credibility of the Program despite numerous formal outreach efforts (including Re-considerations and Letters) by DotMusic to inform ICANN of such activity.

The AGB is clear:

1. 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.
2. 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.[16]

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[15] https://www.icann.org/en/groups/board/governance/reconsideration/14-8/request-annex-dotmusic-4-04mar14-en.pdf
[16] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

It is beyond reasonable doubt that Amazon and .music LLC both mislead Objection Panels with false information which is inconsistent with the changes of their current position not to run exclusive access registries. Why is there no accountability and consistency towards what was stated in Objections by Applicants in comparison to the new position they have adopted pertaining in their Applications? It is clear that the original Applications differ materially with the new Applications and such a change was not made in error. It was made to "survive" both the Objections processes and to "survive" the GAC Advice and subsequent NGPC Resolutions prohibiting exclusive access language for generic strings.

Twelve applicants responded that the TLD would be operated as an exclusive access registry. Twelve (12) Applicants applied for the TLDs .BROKER, .CRUISE, .DATA, .DVR, .GROCERY, .MOBILE, .PHONE, .STORE, .THEATER, .THEATRE and .TIRES. These Applicants consistently defended their position to keep the exclusive access language in their Applications by providing an explanation of how the proposed exclusive registry access serves a public interest goal without changing their positions or being misleading.[17] The overarching question remains: Why did Amazon and .music LLC change their position they took in their Objection response and original Applications and not defend their Applications with ICANN like these 12 Applicants have?

If it is ICANN's belief that both Amazon and .music LLC should be allowed to proceed without any repercussions on their change of position and material changes to their Application then, in fairness, such an opportunity should be given to other Applicants to "fix" parts of their Applications and show how those changes serve a public interest goal. It should be highlighted that the GAC advised ICANN to give "preferential treatment for all applications which have demonstrable community support" such as DotMusic's. Furthermore, in a letter[18] sent to ICANN on February 4th, 2014, the Director of the European Commission of the EU fully endorsed the

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[17] http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf
[18] http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html

"GAC view that community applications and <u>applications with community support should be given preferential treatment.</u>" At the Singapore ICANN meeting in March 2014, GAC reiterated that advice advised ICANN "to protect the public interest and improve outcomes for communities."[19] ICANN approved this GAC advice in Resolutions to take "better account of community views and improving outcomes for communities."[20]

Since ICANN has allowed Amazon and .music LLC to proceed and remove exclusive access language policy changes – which materially alters their Applications (and harms third parties) - then Community Applicants should also be allowed to make any changes to similar policies if they fail CPE and ask for a re-evaluation if they can showcase how the change serves the public interest.

By approving the changes to Amazon's Applications or allowing .music LLC to proceed without any accountability to their exclusive access language in their Application makes <u>ICANN immediately liable</u> for "material changes" harming 3rd-parties and Objectors, especially if those changes were approved to protect the public interest consistent with <u>identical concerns that were expressed by the Objectors in Objections that were dismissed (emphasis added)</u>. If the objected-to Applications were not going to cause a "likelihood of material" harm then why did ICANN agree to GAC Advice and to implement contractual provisions focusing on preventing the same harms expressed in Objections and why has ICANN approved such material changes by Amazon or allowed .music LLC to circumvent a change request due to their exclusive access language?

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

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[19] https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2 (Pg.4, Section 3, 1a)
[20] GAC Register #18, http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf

Other groups adversely affected by the inaction are community applicants who have serious concerns about the unintended consequences and precedents created in the new gTLD Program in relation to material changes[21] which are inconsistent to the AGB. Such Material Changes by Applicants through ICANN-accepted material changes to remove exclusive access policies in Amazon's or .music LLC's Applications have no consequences or accountability mechanisms to protect community applicants in a contention set. In context, Community Applications already abide to the Registry Dispute Resolution Procedure (RRDRP) built-in accountability mechanism.[22] Applicants who have submitted PICs are subject to PICDRP[23] but this process is only available <u>after</u> delegation upon resolution of the TLD contention set.

Changes of position, in alignment with Objectors' views pertaining to exclusive access language, which materially alter current Applications indicates procedural flaws of the ICANN new gTLD Process, the Community Objection process and also vindicate Community Objectors' positions without any accountability to objected-to Applicants who are now allowed to change material policies by ICANN without consequences. ICANN has even took this issue a step further by revising the new gTLD Registry Agreement with language vindicating Objectors views but has approved Amazon's changes despite Amazon giving information that now is deemed <u>false and misleading</u>. According to the AGB this kind of activity "may result in <u>denial of the application</u>."

Such Material Changes significantly change an Applicant's business model and other critical components in their Application, such as financial statements and their Letter of Credit and have been reflected in the changes submitted by Amazon for .MUSIC, .SONG and .TUNES. Under the ICANN AGB rules such material "changes" will likely "involve additional fees or evaluation in a subsequent application round." As such, the existing new gTLD process has lost meaning

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[21] http://newgtlds.icann.org/en/applicants/customer-service/change-requests
[22] http://www.icann.org/en/news/public-comment/rrdrp-15feb10-en.htm
[23] https://www.icann.org/resources/pages/picdrp-2013-10-31-en

since any Applicant is now allowed to "shift" their position without accountability of any sort or ICANN action to prevent such violations. On the contrary, ICANN knowingly is harming third-parties despite continuous correspondence to prevent such discrimination and unfairness. Since ICANN has allowed such material policy changes to be approved then it is obvious that other Applicants, such as Community Applicants with demonstrable support, should be treated in the same manner to be able to change their policies if they are deemed insufficient to pass CPE and if it can be proved that their changes serve a public interest goal.

There is substantial evidence that a policy change – such as changing registry policies from exclusive-access to non-exclusive access is material. It has been proven by GAC Advice, NGPC Resolutions and both the .POLO and .MOBILE Expert Determinations that exclusive access language is relevant and material. One of these Community Objection Determinations was upheld against Amazon's .MOBILE, an application which is identical to the .MUSIC, .SONG and .TUNES Applications. On April 10th, 2014, Expert Kap-You Kim upheld the Community Objection against Amazon filed by the CTIA <u>ruling that exclusive access language is not only material in nature but they are also materially detrimental to related-communities that are strongly associated with strings</u> (such as the Amazon applied-for strings .MUSIC,.SONG and .TUNES which are strongly associated with the music community). The expert opined:

> The gTLD .MOBILE is not a generic descriptor like ".com" (short for "company") but an <u>identifying descriptor that is widely used to refer to the community</u>...Within the bounds of the Mobile Wireless Community, .MOBILE could easily function in a manner similar to the way .COM functions in the broader internet economy (Section 131, Pg.40).

> Top-level domains are not co-equal with the second-level market. There, excepting certain limitations and preclusions, one need only find a unique name and pay to register it. However, a TLD is something else entirely. A market participant cannot simply "register" a TLD like .MOBILE or .WIRELESS or .APP, as it can register a second-level domain like "app.com." Rather, one must become the registry, which is an expensive, time consuming,

complex process. And after a registry is selected, it cannot simply sell its rights as a registry to another market participant. It is a highly regulated position, subject to the oversight if ICANN and to numerous regulations (Section 132, Pg. 41).

The <u>establishment of unrestricted, exclusive rights to a gTLD that is strongly associated with a certain community or communities</u>, particularly where those communities are, or are likely to be, active in the internet sphere, seems to me <u>inherently detrimental to those communities' interests</u>. And it is unquestionably the case that the Mobile Wireless Community is a community for which domain name "real estate" is of high value. (Section 135, Pg. 41)

The Mobile Wireless Community Will Suffer Significant and Extensive Economic Harm Should .MOBILE BE Delegated to Amazon Under the Terms Set Out in the New gTLD Application (Section 5.2.4.3, Pg. 41).

The <u>Level of Certainty That the Alleged Harms Will Occur Is Very High</u> (Section 5.2.4.4, Pg.42)

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

ICANN has approved material changes to Amazon's Applications for .MUSIC, .SONG and .TUNES to remove material exclusive access language from their Applications, Such action negatively affects third-parties (such as Objectors who have objected to Amazon's exclusive access language) and Applicants in the same contention set. Such approved changes fail to meet the change request Decision Criteria (AGB 1.2.7) to approve a change request with respect to:

- Explanation

- Evidence that original submission was in error

- Other third parties affected

- Precedents

- Fairness to applicants

- Materiality

- Timing

Furthermore ICANN has also failed to invite .music LLC (an Applicant which was also subject to Objections relating to exclusive access language) to submit a change request despite numerous formal correspondences with ICANN (including a Re-consideration request alert ICANN of this discrepancy). Since ICANN is knowledgeable and has been informed of Applications with exclusive access language then these Applicants should be treated equally and be required to submit a change request for accountability and fairness purposes.

ICANN's new position in regards to Material Changes and discrepancies deviate from the Applicant Guidebook and are inconsistent since some Applicants (such as Amazon) have been asked to submit a change request, while others (such as .music LLC) have not been asked to submit a change request for their Exclusive Access language Application. In a March 4th 2014 letter[24] from ICANN to the Community gTLD Applicant Group (CTAG), the Vice-President of New gTLD Operations Christine Willett stated:

> In regards to your questions about GAC Category 2 Advice, we would like to remind you that in participating in the New gTLD Program, applicants have certified that the application materials presented are accurate and complete (see the Top-Level Domain Application Terms and Conditions in Module 6 of the Applicant Guidebook: http://newgtlds.icann.org/en/applicants/agb/terms-04jun12-en.pdf).
> Additionally, per Section 1.2.7 of the Applicant Guidebook, if at any time during the evaluation process information previously submitted becomes untrue or inaccurate, the applicant must notify ICANN of such changes. In the event that there is a "discrepancy between what the applicant states and what the applicant provided in their response to ICANN," the registry operator is still expected to comply with Specification 11 of the Registry Agreement, which prohibits registry operators of generic strings from imposing eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's affiliates. Any allegations that a registry operator is violating its obligations under Specification 11 could be addressed through ICANN's Public Interest

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[24] http://www.icann.org/en/news/correspondence/willett-to-schwartz-04mar14-en.pdf

Commitments Dispute Resolution Procedure (PICDRP) or by ICANN's Contractual Compliance team.

This is in direct contrast to the Applicant Guidebook, and its many versions and revisions, which was based on years of open and frank discussion, debate and deliberation with the Internet community. The standards for evaluating the merits of an application have been debated and have been well known for years. The AGB does not mention a PICDRP and this does not answer the question why ICANN has yet to ask .music LLC for a change request in the same manner it has required others (such as Amazon) pertaining to the same exclusive access issue. While we understand ICANN has incorporated accountability mechanisms <u>after</u> delegation, it is not in its commitments for transparency, fair treatment and non-discrimination to ignore some requests at the benefit of others. In other words, what is requested from one Applicant on the same subject-matter should be requested from all especially after continuous notification of that such issues exist. Without a transparent and accurate application the unintended consequences do not serve the global public interest because they can no longer hold applicants accountable given the new discrepancies that ICANN is allowing to co-exist in violation with the AGB.

The Affected Parties believe that there was inaction by ICANN:

1) by <u>failing to take into consideration the seven (7) Decision Criteria of the AGB</u> (Section 1.2.7, "New gTLD Application Change Request Process and Criteria") for change requests leading to the <u>approval of material change requests for Amazon's .MUSIC, .SONG and .TUNES Applications allowing</u> which fundamentally allowed Amazon to <u>materially change positions</u> in contrast with Amazon's Responses in Objection proceedings without ramifications to the detriment of Objectors and/or other Applicant(s) in contention set;

2)   by failing to follow a process by which <u>exceptional modifications and material changes to</u> <u>Applications</u> are not approved. Failing to address the effect of such actions to ongoing Objections violated Article 4 of the Articles of Incorporation and Article 1, Section 2, 7, 8, and 9 of the ICANN Bylaws resulting in a breach of process and calls into question the legitimacy of the Program;

3)   by <u>harming applicants in a contention set</u> as well as <u>Community and Legal Rights</u> <u>Objectors</u> against objected-to .MUSIC/.SONG//TUNES Applicants who relied on the AGB's language;

4)   in <u>failing to invite .music LLC for a change request despite ICANN's knowledge that</u> <u>such language existed</u> compromising the credibility of the new gTLD program and sheds how some Applicants are treated in a discriminatory and unfair manner by ICANN without any accountability.

DotMusic has also filed comments[25] during the 30-day Public Comment period following the ICANN acceptance of the material change requests for Amazon's Applications for .MUSIC, .SONG and .TUNES (See Appendix G).

9.   What are you asking ICANN to do now?

1. Reimburse the Legal Rights and Community Objectors for all of its expenses, including but not limited to attorney fees, administrative expenses and Expert fees associated with Objection cases filed against Amazon and .music LLC relating to exclusive access

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[25] https://gtldcomment.icann.org/applicationcomment/viewcomments

language which ICANN has now approved to be removed after the objected-to Applicants' change requests or actions to remove such language from their Applications;

2. If such changes are allowed to proceed to allow new Legal Rights and Community Objections be filed for these cases with appropriate Experts;

3. Determine that objected-to .music LLC's GAC Responses (that they do not intend to be exclusive access registry) be deemed material and inconsistent with their position in Community Objection Responses and policies in their current Application and initiate a change request for Applicant 1-959-51046 to reflect such material changes pertaining to removing exclusive access language since it violates the AGB (1.2.7) stating that at any time during the evaluation process information previously submitted becomes untrue or inaccurate, the applicant must notify ICANN of such changes. It is clear from Applicants' Objection responses that information provided to Panels was misleading. According to ICANN "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;"[26]

4. Amazon and .music LLC both mislead Objection Panelists and did not defend their Objection Responses when it came to GAC Category 2 Responses and Amazon's material changes in its approved change request. ICANN allowed Amazon to delete exclusive access language from Amazon's Applications which resulted in widespread changes across its Applications and re-scoring of material parts of the Application. Amazon made changes to sections for Questions 18, 22, 28, 29, 46, 47, 48, 49, and 50. Questions 28 (Abuse Prevention and Mitigation), 29 (Rights Protection Mechanism), 46

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[26] http://newgtlds.icann.org/en/applicants/customer-service/change-requests

(Projections Template), 47 (Costs and Capital Expenditures), 48 (Funding and Revenue), 49 (Contingency Planning) and 50 (Funding Critical Registry Functions) are all scored sections in which Amazon has originally received a score of 2, 2, 1, 2, 2, 2 and 3 respectively in their original Initial Evaluation scores (See Appendix F). A policy change of such significant nature relating to removing exclusive access language in Amazon's Applications will require re-evaluation of each affected section as described. It is clear that such an approved change by ICANN does affect string contention and community priority evaluation as described earlier. Such a re-evaluation of an Application based on policy changes (removing exclusive access language) negatively affects DotMusic, a community applicant involved in Community Priority Evaluation. If Amazon or .music LLC is allowed to proceed to change eligibility policies in their Applications (which is the current case since ICANN has approved Amazon's change requests and has not invited .music LLC for a change request despite .music LLC's GAC Category 2 Advice Response that its Application will not have their objected-to exclusive access language) then DotMusic should be allowed to make such policy changes as well if DotMusic does not pass CPE and be re-evaluated. Since such changes are material changes and do affect Application scoring, CPE, Communities, Objections and contention sets, ICANN should apply the provisions in the AGB to require re-evaluation in a subsequent round for .music LLC's .MUSIC Application and Amazon's .MUSIC, .SONG and .TUNES Applications (Noting that Amazon is the sole Applicant for .SONG and .TUNES): "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 (AGB 1.2.7)."

5. If objected-to Applicants are allowed to proceed with policy material changes in their Applications and a decision is made by the ICANN BGC that ICANN's currently-

approved changes relating to Amazon's Applications and .music LLC's GAC Category 2 Advice Responses are acceptable and consistent with the AGB (Section 1.2.7) then in fairness and without discrimination, DotMusic, (which has clearly been negatively affected by the allowance of such preferential treatment to Amazon and .music LLC to change their eligibility policies), should be allowed to make policy changes to its Application if it does not pass CPE, just as long as DotMusic shows how such changes serve the public interest and that its Application has demonstrable support in alignment with GAC Advice and NGPC Resolutions pertaining to preferential treatment of Applicants with demonstrable support.

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

DotMusic Limited (.MUSIC) is community Applicant for a music-themed gTLD (.music) and is the representative for Legal Rights and Community Objections. All Applicants and Objector(s)/Related-Objector Entities are entitled to a fair, equal and appropriate evaluation of procedures. .MUSIC (as a community applicant) could be adversely affected in ICANN's actions to allow Amazon and .music LLC to proceed despite their change of position to remove exclusive access language from their Applications which are material changes. If CPE fails, .MUSIC will be subject to expensive auctions which - as agreed upon by the EU[27] - were designed to favor deep pocketed Applicants – such as Amazon and Google – who also have a prior well-known history with the piracy of music (Google as a provider of ad networks to pirate

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[27] http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html

sites and Amazon as a leading advertiser on pirate sites).[28]

Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN despite the excessive costs and resources attributed to filing Objections. ICANN has also rejected changes from Applicants that were less material than those they approved in Amazon's favor.

Failure to Consider Evidence: Expert failed to consider relevant evidence relating to: (i) Objections against Applicants with exclusive access language; and (ii) Correspondence with ICANN alerting ICANN that .music LLC's application has exclusive access language which is in contrast with their GAC Category 2 Response which claimed they did not have such language. ICANN has yet to invite .music LLC for a change request.

Violation of ICANN Articles of Incorporation: Article 4 calls ICANN to operate for the benefit of Internet community as a whole, carrying out activities in conformity with relevant principles of international law and applicable international conventions and local law, and to the extent appropriate and consistent with its Articles and Bylaws, through open and transparent processes that enable *competition and open entry in Internet related markets.* ICANN should have properly communicated and delegated functions to the ICC but failed to do so in violation of ByLaws Art. 1, Section 2, 3: *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties*. (ByLaws Art. 1, Section 2, 7 *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process*; ByLaws Art. 1, Section 2, 8 *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

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[28] http://www.billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars and http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc/

11.Are you bringing this Reconsideration Request on behalf of multiple persons or entities?
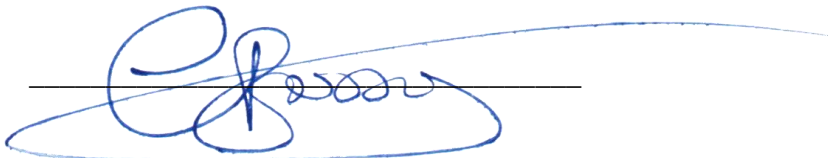
Yes

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

Do you have any documents you want to provide to ICANN? Yes, see Appendix

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Constantinos Roussos

.MUSIC™ (DotMusic Limited)   Date: June 5th, 2014

www.music.us