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Cherine Chalaby, ICANN Chair of the New gTLD Committee;
Thomas Schneider, ICANN Chair of Government Advisory Committee;
Cyrus Namazi, ICANN Vice-President of DNS Engagement;
John Jeffrey, ICANN General Counsel; and
Community Priority Evaluation Panel, Economist Intelligence Unit

12 October 2015

Re: Support for .MUSIC Community Application and Response to Music Community Obstruction

Dear ICANN and Economist Intelligence Unit (“EIU”):

Our organization, Music and Entertainment Rights Licensing Independent Network¹ (“Merlin”), supports the community-based DotMusic Application (ID 1-1115-14110)² for .MUSIC to safeguard intellectual property and serve the legitimate interests of the entire global music community. The multi-stakeholder community defined matches the *nexus*³ for the applied-for string by including all commercial, non-commercial and amateur stakeholders related to music without discrimination.

Merlin is a global music rights agency representing independent record labels on a worldwide basis. The Merlin organization is owned and controlled by a not-for-profit foundation, supervised by a member-elected board representing Merlin’s global independent membership. Reflecting Merlin’s global scope and ambitions, this board consists of 15 members - five each from North America, Europe and Rest of the World. Merlin has struck deals for its global membership with the world's most important new-generation

¹ <http://www.merlinnetwork.org>

² See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392>

³ An independent Nielsen survey (similar to the Global Registrant Survey conducted by Nielsen on behalf of ICANN, See <https://www.icann.org/news/announcement-2015-09-25-en>) addressed whether the applied-for string was commonly-known (i.e. known by most people) and associated with the identification of the defined community. Most people, 1562 out of 2084 (3 in 4 or 75% of the respondents) responded “Yes.” (See Nielsen / Harris Poll, Quick Query Q3505, <http://music.us/nielsen-harris-poll.pdf>, Fielding Period: August 7-11, 2015, Pg. 1, 2 and 3). Furthermore, independent testimonies and disclosures from over 40 experts agreed with this assessment (See <http://music.us/expert/letters>).



digital music services, including Spotify, Pandora, Soundcloud, Beats (Apple), Vevo, Guvera, Slacker, Google Play, YouTube, Rdio and Deezer.⁴

Established in 2007, Merlin's mission is to ensure that its independent record company and distributor members have a vehicle to protect and enhance their ability to compete in the ever-changing world of digital music. Membership is open to any independent recorded music company.⁵ Acting on behalf of more than 20,000 labels and distributors across 40 countries collectively, Merlin provides its members with effective access to new and emerging digital revenue streams. For digital services, Merlin offers significant efficiencies: allowing the opportunity to globally license - via a single deal, instead of hundreds of individual local deals - the world's most important and commercially successful independent music labels. To date, Merlin has licensed the leading new generation digital music services - helping to ensure that independent recorded music is appropriately valued and protected in the digital market.⁶

Our organization supports a secure and trusted Internet ecosystem helps music grow and thrive. For such an ecosystem to flourish, serve the global public interest and protect the legitimate interests of the global Music Community, responsible measures and safeguards to deter copyright infringement and bad actors are of great essence. Despite the low domain registration volumes of new gTLDs, many new gTLD registries have not adequately protected the fundamental rights of creators by taking effective action against infringers and abuse.

We would also like to express serious concerns⁷ about the spurious, unsubstantiated opposition letters we understand were filed by opponents of the "community" model against DotMusic Limited's .MUSIC community-based application. We understand that a DotMusic competitor, its allies and other negligible entities that have no association with music filed last-minute opposition letters to obstruct the multi-stakeholder community application from prevailing Community Priority Evaluation (CPE). Community applications have been the subject of what is by far the longest public comment period in ICANN history. The DotMusic application has been open for public comment since 2012 i.e. for nearly 3 and half years. Reasonably, one would expect that any truly concerned organization or entity would have voiced their opinions years ago when the application was first published, especially taking into context DotMusic's public outreach efforts since 2008.⁸ We believe this would have represented a "good faith" concern because community applicants could have undertaken to deliberate with the concerned party to establish whether to make changes in their applications to accommodate that party if the broader community agreed through an application change request process. As such, any last-minute letters of opposition should be considered in this context. By any measure, more than enough time has passed for legitimate

⁴ <http://www.merlinnetwork.org/whowelicense>

⁵ <http://www.merlinnetwork.org/membership/who-can-join>

⁶ <http://www.merlinnetwork.org/what-we-do>

⁷ These concerns were also reiterated by: the American Association of Independent Music (A2IM), see <https://icann.org/en/system/files/correspondence/neuman-to-crocker-et-al-01oct15-en.pdf>; the Worldwide Independent Network (WIN), see <https://icann.org/en/system/files/correspondence/wenham-to-icann-06oct15-en.pdf>; and the International Federation of Musicians (FIM), see <https://icann.org/en/system/files/correspondence/machuel-to-icann-05oct15-en.pdf>

⁸ <http://music.us/events>



concerns to be raised by any party (including formal community objections). According to ICANN, the deadline for community objection closed on 13 March, 2013 and⁹ as such, any opposition against DotMusic is out of time and we believe as a matter of process, should not be considered.

We understand that the obstruction was orchestrated by Donuts, a .MUSIC competitor and the largest gTLD applicant, which has a history of engaging in a pattern of obstruction against community applicants¹⁰ and ICANN.¹¹ These opposition letters followed a common script (that was provided in a template letter distributed by Donuts) to shun the existence of the Music Community. ICANN has passed Resolutions on Safeguards (Category 1) based on Government Advisory Committee (GAC) advice stating that “music” is a sensitive, regulated sector. This regulated music sector is driven by an organized and delineated Music Community that encompasses both commercial and non-commercial constituents, as defined by DotMusic Limited (“a strictly delineated and organized logical alliance of communities related to music”). We understand that another letter orchestrated by a Donuts ally also attacked ICANN’s own mandated CPE “Eligibility” policy to restrict registration to the Community members as “chill[ing] free expression on the Internet.” As ICANN has stated in recent filings:

When an applicant submits a community-based application, it is not, as the [Opposition Letters] imply, simply seeking to “exploit the application process” (IRP Request ¶ 47). As set forth in the Guidebook, community-based applicants agree to operate the applied-for gTLD “for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1, Cls. Ex. RM-5). This involves implementing “dedicated registration and use policies for registrants in [the applied-for gTLD],” (Guidebook § 1.2.3.1, Cls. Ex. RM-5) policies that substantially restrict the sorts of domain name registrations a gTLD may accept and thereby might significantly limit the potential profitability of a gTLD. (Pg.6)...The recommendation of the GNSO that applications representing communities be awarded priority in string contention (ICANN Board Rationales for the Approval of the Launch of the New gTLD Program at 94 (“ICANN Board Rationales”) (Cls. Ex. RM-11)). (Pg.10)¹²

Contrary to the opposition comments, DotMusic’s application pledges:

A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part

⁹ <http://www.iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/how-to-file-an-objection> and <https://newgtlds.icann.org/en/program-status/odr>

¹⁰ According to a letter from the Sports Communities: “[The Sports Communities requested for the] end to Donuts’ unwarranted, anticompetitive and illegitimate attempts to delay the delegation to the Sport, Ski and Rugby Communities of their legitimately-won and long overdue New Generic Top Level Domain Names,” See <https://www.icann.org/en/system/files/correspondence/omahoney-et-al-to-klitgaard-21nov14-en.pdf>, Pg. 1

¹¹ According to ICANN: Donuts’ “Requests are exceptionally broad and inappropriate” and would “impose a massive burden on ICANN that would delay this already-delayed proceeding considerably further,” See <https://www.icann.org/en/system/files/files/icann-letter-brief-donuts-10aug15-en.pdf>, Pg. 1

¹² <https://www.icann.org/en/system/files/files/icann-response-birch-mmx-irp-request-redacted-27apr15-en.pdf>



*of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes;*¹³ (Enumerated Commitment #3)

*A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.*¹⁴ (Enumerated Commitment #5)

We understand that a letter was also filed by Rightside¹⁵ which stated that “it is preposterous...to claim that there exists a “music community.””¹⁶ We note that such statement seems inconsistent with public marketing material for promoting the .BAND music-themed gTLD, which is operated by Donuts and Rightside. Marketing material clearly mentions promotions to “music communities” (Pg.2),¹⁷ which is consistent with DotMusic’s definition of the Music Community as a logical alliance of “music communities.” Another .BAND Marketing Kit also refers to existence of the “music sector”. Another example showcasing the questionable nature of the template letters orchestrated by Donuts is the discrepancy and inconsistency illustrated in a letter,¹⁸ which described its organization as one that was “comprised of musicians...and individuals in the music community.” Despite acknowledging the existence of the “music community” in its company description, the letter later takes the inconsistent position to doubt the existence of the “music community” by incorporating Donuts’ talking points which refer to a “music community,” *if such a thing even exists..* Accordingly, we would respectfully submit that the Community Priority Evaluation panel should determine that there is no relevant opposition to the DotMusic application.

DotMusic does have the support of the majority of the Community defined.¹⁹ Over 95% of global music consumed is created, promoted or distributed by the delineated and organized Community that has supported DotMusic’s application, including many commercial and non-commercial entities together mainly dedicated to the Community, such as the IFPI, RIAA, FIM, ICMP, IFACCA, IAMIC, ISME, A2IM, WIN, NAMM, NMPA, Merlin and many others. Without these stakeholders and organized processes that the defined Music Community follows, it would be impossible for the general public to enjoy the music that they do today. Music would not exist in its present form. Musicians cannot be recognized, compensated or attributed appropriately without the defined organized and delineated Music Community. To deny that the Community exists or that it does not participate in a shared system of

¹³ <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>

¹⁴ <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392> , Commitments #3 & #5

¹⁵ Rightside and Donuts are co-applicants for both .MUSIC and .BAND

¹⁶ <https://www.icann.org/en/system/files/correspondence/hammock-to-crocker-et-al-12aug15-en.pdf>

¹⁷ <http://branding.rightside.co/api/download/28qb-dj9ehrud>

¹⁸ <https://www.icann.org/en/system/files/correspondence/hutcherson-to-crocker-et-al-07aug15-en.pdf>

¹⁹ See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadattachment/142588?t:ac=1392> and <http://music.us/supporters>



creation, distribution and promotion of music with common norms and communal behavior is akin to denying the existence of music altogether.

The Music Community shares a legal framework governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments, which includes shared rules and communal regulations. In addition, further evidence that there is cohesion within the Community is the existence of numerous globally-recognized standards and classification systems, which identify who the individual songwriters, publishers and rights holders are and which songs they are associated with, so that community members are appropriately compensated or attributed. Such global music classification systems include the ISMN, ISRC, ISWC and the ISNI.

Thus far, there have not been any community-based, music-themed TLDs launched in the new gTLD Program. We urge the EIU to follow GAC Advice²⁰ and ICANN Resolutions²¹ and give preferential treatment to DotMusic's community application, which has demonstrable support, by ensuring that it prevails CPE to increase diversity, differentiation and music-tailored safeguards in the New gTLD Program. Such a result would serve the global public interest and ensure that the multi-stakeholder music community governs .MUSIC in a responsible, trusted and safe manner.

We believe any other result would compromise the credibility and reputation of both ICANN and the EIU because, as outlined in the 2007 GNSO Final Report for the Introduction of New Generic Top-Level Domains, "where an applicant lays any claim that the TLD is intended to support a particular community, that claim will be taken on trust (CV 7 -10)" and a "community should be interpreted broadly and will include, for example, an economic sector, a cultural community" (IG P*)²² such as the music "(industry) community" defined in the DotMusic multi-stakeholder community application. Section 4.2.3 of the Applicant Guidebook further reminds the stated goal of the CPE process, which was to "identify qualified community-based applications, while preventing both 'false positives' (awarding undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string) and 'false negatives' (not awarding priority to a qualified community application).

²⁰ The GAC issued advice to ICANN in multiple Communiqués regarding CPE and the various outcomes. In its Communiqués from Beijing, Durban, and Singapore, the GAC referred to "preferential treatment" that should be given applications with "demonstrable community support" or a "collective and clear opinion." (See Governmental Advisory Committee. (11 April 2013) GAC Communiqué – Beijing People's Republic of China. Retrieved from <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>; See Governmental Advisory Committee. (18 July 2013) GAC Communiqué – Durban, South Africa. Retrieved from <http://durban47.icann.org/meetings/durban2013/presentation-gac-communique-18jul13-en.pdf>; See Governmental Advisory Committee. (27 March 2014) GAC Communiqué – Singapore. Retrieved from <http://www.icann.org/en/news/correspondence/gac-to-board-27mar14-en.pdf>)

²¹ In the 14 May 2014 scorecard, ICANN responded to the GAC that it "[would] continue to protect the public interest and improve outcomes for communities, and to work with the applicants in an open and transparent manner in an effort to assist those communities within the existing framework." (See ICANN. (14 May 2014) Annex 1 to Resolution 2014.05.14.NG02. Retrieved from <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-14may14-en.pdf>)

²² <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>



Respectfully submitted,

~~Music and Entertainment
Rights Licensing
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Amsterdam~~

For and on behalf of

Music and Entertainment Rights Licensing Independent Network BV