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Heather Dryden, Chair of Government Advisory Committee
John Jeffrey, ICANN General Counsel
Hannah Tümpel, Manager, International Chamber of Commerce

Re: Clarification on ICANN-GAC Resolutions Impact on Pending Community Objections

Dear Dr. Crocker, et al:

We write to formally record our concerns about the current Community Objection process and the impending potential to create prejudicial “exceptions” based on ICANN’s recent resolutions pertaining to acceptance of GAC advice on enhanced safeguards.

In response to the July 3, 2013 announcement of the proposed GAC and New gTLD Program Committee (NGPC) meetings in Durban, it should be noted that DotMusic, Limited and related Music Community Objectors filed timely Community Objections with the ICC that pre-date the GAC Beijing Communiqué,¹ yet identify many of the same concerns GAC voiced for sensitive strings (like .MUSIC) e.g. Applicants’ lack of enhanced safeguards; the need for an appropriate governance structure; and requirement that restricted/exclusive strings launched in a manner to serve global public interest.

The questions and issues to be evaluated in Durban, raise potential conflicts that could be abused by Applicants to circumvent the Community Objections, and may also result in wholesale granting of “material changes” to Applications to the detriment of those in competing strings and in conflict with the terms of the Applicant Guidebook. It is clear that any new ICANN gTLD Application policy changes not clearly described in Application should be treated as material changes (as defined in the AGB) to individual Applicant Applications. Therefore, we respectfully request that these concerns are recorded and evaluated.

¹ In its Beijing Communiqué 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?version=1&modificationDate=1365666376000&api=v2

Pending Community Objections, GAC, Independent Objector and NGPC Concerns

The pending Objections and the GAC Advice identified, among other things, the following pertinent concerns:

- a) Sensitive strings (such as music-themed 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;²
- b) The need for 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”; 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.³

Similarly, the ICANN Independent Objector also acknowledged the “importance of the problem” surrounding competition and consumer choice relating to exclusive access to TLDs stating that:

The question of the openness of new gTLDs is crucial, particularly when it comes to terms that could be profitable to a large part of the public, and this is undoubtedly the case concerning gTLDs strings such as... '.music'⁴

With these points placed squarely in front of ICANN, the NGPC responded to GAC and accepted this crucially relevant GAC advice⁵ and added the requirement of Category 1 safeguards.⁶ Furthermore, ICANN has agreed that opinions of any relevant community - such as the cases brought forward to the ICC in regards to music-themed strings (especially those in a contention set) – are to be strongly taken into consideration. The Objections echo GAC's advice that strings, such as music-themed strings, "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm"⁷ and also

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?version=1&modificationDate=1365666376000&api=v2

³ https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2

⁴ Independent Objector's Mission, <http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds>

⁵ <https://www.icann.org/en/news/correspondence/crocker-to-dryden-06jun13-en.pdf>, Annex 1, GAC Register #5, P.11

⁶ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>

⁷ https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2



mirror the U.S Government's warning to ICANN of the high likelihood of scams urging "ICANN to apply new strengthened safeguards."⁸

The Music Community Objectors, ICANN, GAC and U.S Government agree that: allowing sensitive, open music-themed applications to proceed without appropriate safeguards⁹ and community governance structure will categorically produce material harm especially within the context of the semantic importance, sensitivity and popularity of a music-themed string.

DotMusic and the Objectors also agree with GAC on the appropriateness of Category 2 safeguards for such sensitive strings and urge ICANN to take GAC's advice here as well. We have re-iterated these concerns in a Public Comment letter to ICANN and GAC about the issues of piracy, abuse and policies that would appropriately serve the global public interest under these sensitive strings.¹⁰ DotMusic publicly demonstrated strong evidence, including indisputable domain-related research, why open gTLDs without enhanced safeguards will create material harm, including concerns about exclusionary applications.¹¹ While the details are beyond the scope of this public comment, it should be noted that globally-recognized and highly credible associations strongly associated with the creative communities, whose business models are dependent on copyright protection and monetization, have also publicly voiced serious concerns¹² that there will be a strong likelihood of material harm without appropriate enhanced safeguards in place for these strings.

Further documenting these concerns, another public comment letter¹³ was sent to ICANN to identify the need to incorporate the appropriate governance structure to serve the interests of these communities - by globally-recognized representatives of the Independent Music Community, including the American Association of Independent Music (A2IM)¹⁴ and related affiliates.

Because these issues are being addressed by ICANN and the GAC during the Durban Meeting, we would like the record to reflect that a significant portion of the music community

⁸ http://images.politico.com/global/2013/06/26/rockefeller_letter_to_icann.pdf, June 26th, 2013

⁹ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

¹⁰ <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/pdf/tstysBP7f.pdf>

¹¹ <http://music.us/open-music-themed-sensitive-gtld-harm-without-safeguards.pdf> (Safeguard concerns),

<http://music.us/DotMusic-Concerns-with-Application-1-959-51046.pdf> (Concerns over .MUSIC community application excluding a significant community portion e.g legitimate fans, DIY artists & any organization formed after Sept. 2007)

¹² <http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/>

¹³ <http://www.icann.org/en/news/correspondence/bengloff-to-crocker-et-al-06mar13-en>

¹⁴ A2IM's label membership represents 32.6% U.S music industry's sales and a significant portion of global sales (e.g Adele and Taylor Swift - artists signed with A2IM Member Labels Beggars Group and Big Machine respectively - were the two top-selling artists globally of 2012). A2IM Associate Members include Apple iTunes (63% of global digital music sales – a significant portion), Microsoft, Spotify, Pandora and most of the leading legal music digital distributors. The correspondence letter included A2IM affiliates WIN (representing label creators in over 20 countries), the Association of Independent Music in the U.K, the Independent Music Companies Association (IMPALA) and Merlin Network. Collectively this strictly delineated community with the shared, common interest of "promoting and distributing legal music" constitutes "a significant portion of the music community to which music-themed TLD strings may be explicitly and implicitly targeted" with clear, formal membership.



submitted timely Community Objections **before** this crucially-important GAC Beijing Communique advice was issued, re-iterating the **same** concerns against **all** portfolio applicants who applied for **open** music-themed strings that lacked appropriate enhanced safeguards, did not have an appropriate governance structure to serve the interests of the community, including any that were deemed discriminatory, anti-competitive and compromised consumer choice.

Community Objection Process, Material Changes, and Loopholes for Applicants

The Portfolio applicants' lack of pro-active enhanced safeguards for applied-for sensitive, open music-themed TLDs of such semantic meaning, nature, popularity and history of abuse is clear evidence that these Applicants are not acting nor intend to act in accordance with the interests of the community or of users more widely. Another worrisome indication is the fact that **all** portfolio Applicant Objection Responses ignored and **rejected** the Community Objectors' standing, which represents a substantial majority of the music community. Moreover, the Applicants rejected Objectors' concerns regarding the conspicuous absence of enhanced safeguards from their Applications, and the appropriateness of other suitable policies, including incorporating a suitable multi-stakeholder governance structure serving the interests of the music community. One portfolio Applicant even disingenuously incorporated a Governance Council under its **open** gTLD application despite the fact that the Council must comply with the Applicant's open policies as stated in the Application. Accordingly, it is clear any appropriate recommended changes advised by such a Council – such as incorporating appropriate pro-active safeguards relating to name selection, eligibility and use policies – will be futile and not permissible since they would be construed as material changes (as defined in the AGB).¹⁵

In light of the prejudicial harm, any new ICANN gTLD Application policy changes **not clearly described in Application** should be treated as **material changes** (as defined in the AGB) to individual Applicant Applications. Moreover, such potentially sweeping changes to a particular Applicant's Application and policies (to the extent they are accepted) should **not** be presented to the Community Objection panelists because such changes would “be construed as unfair,” would “affect string contention,” and “affect other third parties materially”¹⁶ (such as community applicants who already incorporated appropriate restrictions and enhanced safeguards in their Applications and more importantly Community Objectors who had no knowledge of GAC advice and ICANN resolutions before submitting the Objections).

We respectfully request that ICANN appropriately instruct the ICC that all applications evaluated by Objection panelists be judged solely on their own merit (within the four-corners of the Applications) without considering new material changes made by ICANN in response to GAC Advice (or newly created self-serving statements by Applicants).

¹⁵ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7

¹⁶ <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>, AGB §1.2.7



The repercussions of allowing such loopholes or exceptions could irreparably prejudice the proceedings and lead to the Community Objectors unfairly losing their cases – causing significant financial harm. This will severely compromise the new gTLD Program and unfairly benefit negligent Applicants by granting them immunity despite their Application lacking safeguards and appropriate policies that GAC and ICANN agree must be incorporated to serve the global public interest.

Putting this in context, we note that Community Applicants in a contention set are not allowed to make changes in their Application because they are being strictly graded during Community Priority Evaluation. As such, any agreement by ICANN to allow objected-to Applicants to circumvent the Objection process by leveraging GAC Advice and ICANN resolutions to their advantage will create an undesirable precedent in the new gTLD Program. If this precedent is allowed then Community Applicants should also be given the same leeway to make appropriate changes to their Applications to circumvent the new gTLD evaluation process and successfully pass the Community Priority Evaluation because Community Applicants serve the global public interest.

To avoid such issues from materializing we request that ICANN notify the ICC and the Community Objection Panelists that **any new policies and changes made to Applications by virtue of ICANN resolutions or action after the date that Objections were filed must not be considered and that each Application be judged as it was submitted (in April, 2012) without any material changes affecting contention sets.**

We kindly request ICANN to respond to this letter clarifying that any such newly-formed, material changes will not be considered by the Community Objection panelists and that these Panelists are immediately notified given that some of these proceedings are underway. We thank you again for your time and consideration.

Sincerely,

Constantine Roussos

Founder

.MUSIC:
<http://music.us>

.MUSIC Supporting Music Organizations:
<http://www.music.us/supporters.htm>