



March 14, 2013

Dr. Steve Crocker, Chairman of the ICANN Board
Fadi Chehadé, ICANN President & CEO
Cherine Chalaby, Chair of the New gTLD Committee
Heather Dryden, Chair of Government Advisory Committee

Re: ICANN GAC Beijing Communique

Dear Dr. Crocker, et al.

DotMusic commends GAC for its advice corresponding to sensitive strings, such as music-themed strings which are highly vulnerable to piracy and copyright infringement. Applications for sensitive strings, which exclude legitimate participation and without appropriate enhanced safeguards that protect copyright or music-focused policies that proactively protect intellectual property and mitigate abuse, should not be allowed past the Initial Evaluation stage since they do not serve the global public interest and the creator community at-large.

We applaud and reiterate GAC's recognition and advice "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."¹ This advice is significantly crucial – particularly if applied-for sensitive string(s) are part of a contention set - and highly relevant given the pending Community Objections, the upcoming Community Priority Evaluations as well as the legitimacy, trust and breadth of our application's music community.² These points were also reiterated in the music-themed Community Objections we filed with the International Chamber of Commerce (ICC)³ for applicants for the strings .MUSIC, .TUNES, .SONG and .BAND. We are pleased to see that most of our issues and concerns that were mentioned in the Community Objections were later highlighted and identified by GAC in their Beijing Communique.

It should be noted that our .MUSIC community-based application⁴ surpasses the GAC safeguards and has incorporated the most enhanced safeguards of any .music applicant (or any other applicant that relates to a sensitive string strongly associated to copyright)⁵ and is inclusive of all legitimate music constituents (who are represented in our rotating, multi-stakeholder governance board). We will continue to develop more technology to further thwart piracy and enable stronger copyright protection. The primary objective of our enhanced

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

2 <http://music.us/supporters.htm>

3 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/pending-cases/>

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

5 <https://gtldcomment.icann.org/applicationcomment/commentdetails/11700>

safeguards is to improve user experience in terms of providing higher quality, legal music-focused destinations and to ensure that .music becomes a haven for legal consumption where monies flow to the music community not pirates or illegitimate sites.

We fully agree with GAC's assessment on the issues of exclusive and restricted access to new gTLDs. ICANN's must uphold their commitments and "key responsibilities to introduce and promote competition in the registration of domain names"⁶ and prevent anti-competitive behavior and discriminatory applications based on exclusion. ICANN objectives - as clearly highlighted in their Affirmation of Commitments - relate to "promoting competition, consumer trust and consumer choice."⁷ Allowing certain 'closed' music-themed applications for .MUSIC, .SONG and .TUNES or music-themed applications that exclude a significant legitimate portion of a community from registering will create material harm to that community. This will accomplish the opposite result that ICANN commits to fulfill with the new gTLD Program.

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. For example, any application that is not inclusive of all legitimate constituents, such as "Do-It-Yourself" (DIY) artists or music fans, creates a high likelihood of material harm, anti-competitive issues and unfair discrimination based on exclusion. Legitimate music fans should not be excluded 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.⁸ Fans will play a more protagonist role in artists' careers following the April 2013 signing of the JOBS Act⁹ allowing fans to become investors in artist careers.¹⁰

Despite this, a certain community-based .MUSIC application disallows music fans and DIY artists who do not belong to "accredited" associations to register. This is a highly restrictive and highly discriminatory requirement for registration, especially since music association "accreditation" relating to domain registrations never existed (nor exists now) within the music community. It was created to only allow a select club of associations to participate, which is anti-competitive and discriminatory against significant legitimate portions of the music community. Developing countries will suffer the most in this scenario since there are only a small number of music associations representing music constituents in those regions. Some countries do not even have reputable associations and would in effect be unable to register because of this biased, anti-competitive discrepancy which favors only members from those "accredited" associations.

⁶ <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>

⁷ <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>

⁸ <http://www.crowdsourcing.org/editorial/2013cf-the-crowdfunding-industry-report/25107>

⁹ <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>

¹⁰ <http://www.forbes.com/sites/work-in-progress/2012/09/21/the-jobs-act-what-startups-and-small-businesses-need-to-know-infographic/>

We agree with 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."¹¹ This fact is corroborated by Ofcom's study which revealed that "47% of users cannot confidently identify whether the online content they download, stream or share is legal or not," a statistic that pirates knowingly exploit to deceive and take advantage of Internet users and materially harm music creators despite most fans preference to use legitimate services and benefit the music community economically.¹²

There are certainly serious issues with music relating to the protection of intellectual property on the Internet given the ineffectiveness of the DMCA and the loopholes used by many to monetize piracy while turning a blind eye to content creators. As a matter of fact 39% of pirates are classed as "ambiguous infringers" i.e. downloaders who aren't sure what is legal and what isn't.¹³ This is the heart of the matter with many of these sensitive strings. The perception of legitimacy is what will materially harm content creators while enriching pirates and abusers who will have new legitimate-looking signal posts i.e. sensitive strings to capitalize on.

Music-themed open, non-community based applications lack appropriate music enhanced safeguards¹⁴ that a music-focused community-based applicant would have, and only provides the minimum ICANN protections. McAfee's 2011 security report confirms that such open (and likely lower priced TLDs) are considerably more vulnerable and highly risky for abuse than community-based, restricted TLDs.¹⁵ ICANN's new gTLD program offers minimal copyright protection despite the music community's plea to ICANN for enhanced safeguards^{16 17} for copyrights.¹⁸ Copyrights are not mentioned once in the Applicant Guidebook. Even ICANN's Registrar Accreditation Agreement lists intellectual property, avoidance of user confusion and misleading of users as topics that may be introduced or revised (4.2.7).¹⁹ The inadequacy of these critical sufficient safeguards will create a likelihood of material harm to the music community since these applications merely perform the minimum just to remain in compliance with ICANN in regards to efficient control mechanisms and appropriate accountability checks and balances to effectively protect the music community's legitimate interests.

As mentioned in our Community Objections with the ICC, certain music-themed applications (such as .MUSIC and .BAND) lack appropriate enhanced safeguards and policies to protect intellectual property and to mitigate abuse. Furthermore they fail to incorporate an appropriate music community, multi-stakeholder governance structure to serve the interests of the music

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

¹² <http://media.ofcom.org.uk/2012/11/20/half-of-internet-users-unsure-if-content-is-legal>

¹³ Ofcom Online Copyright Infringement tracking study, <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf>, May 2013

¹⁴ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

¹⁵ http://us.mcafee.com/en-us/local/docs/MTMW_Report.pdf

¹⁶ <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10794>

¹⁷ http://www.onlineaccountability.net/pdf/2012_Mar06_ICANN_EnhancedSafeguards.PDF

¹⁸ <http://forum.icann.org/lists/5gtld-guide/pdfvEjhTvu3H.pdf>

¹⁹ <http://www.icann.org/en/resources/registrars/raa/ra-agreement-21may09-en.htm#3>

community not the applicant's financial interests. These applications should not be allowed past the Initial Evaluation stage.

The Institute for Policy Innovation assessed the annual harm by piracy at \$12.5 billion, 70,000 lost jobs and \$2 billion in lost wages.²⁰ The music industry, despite its significant economic, cultural and personal impact, is small. Theft on this scale has a devastating impact,²¹ diminishing the ability to bring the next generation of artists to the marketplace and dwindling the incentive for aspiring artists to make music a career.²²

Google, an applicant for .MUSIC, publicly announced it would take into account notices of copyright violation to determine site search rank so that infringing sites would fall into obscurity to benefit legal music commerce and consumers would "find legitimate, quality sources of content more easily."²³ However, RIAA's 2013 report²⁴ found no evidence that Google's policy had a demonstrable impact on demoting sites with significant piracy. On the contrary, popular music searches and sites for which Google had received more than 1,000 copyright complaints were "almost 8 times more likely to appear in the top 10 search results than a well-known, authorized music download site."²⁵ Billboard also confirmed legal options were still buried in Google search results for many popular artists. The average rank of the first legal result was 7.9, placing it near the bottom of the first page. The average rank of the first legal MP3 store was 11.75, placing it near the top of the second page. One illegal download site, MP3skull, was the top search result 31 out of 32 times; MP3skull was also the top illegal search result 28 out of 32 times, accounting for 3.6% of the 14.07 million URLs removed from Google's search listings²⁶ with over 500,000 takedown requests.²⁷

Enivisonal's piracy study estimated 24% of global Internet traffic is piracy²⁸ since it is both commercially valuable and free. Combining advertising with pirated content provides a perception of legitimacy which is economically detrimental the music community since it interferes with its core activity of proving safe, legal music downloads to consumers. Much of the piracy is funded by brand advertisers, many of whom are unaware of this fact.²⁹ In 2011, the Congressional Anti-Piracy Caucus wrote to major advertising associations/agencies (ANA, IAB) to curb advertising on illegal websites since advertisements from brands help fund piracy and

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<http://www.ipi.org/ipi/IPIPublications.nsf/f726f4998ba46f86862567d80074727a/d95dcb90f513f7d78625733e005246fa?OpenDocument>

²¹ http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Nobody_Stole_Pie&news_month_filter=3&news_year_filter=2010&searchterms=nobody%20stole%20pie&terminclude=&termexact=

²² http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Illegal%20Downloading_Fewer%20Musicians&news_month_filter=7&news_year_filter=2010

²³ <http://insidesearch.blogspot.com/2012/08/an-update-to-our-search-algorithms.html>

²⁴ http://www.digitalmusicnews.com/uploads/21/2d/212dec74bfd619c10a8fd41273082fbc/riaa_google_reportcard.pdf

²⁵ http://riaa.com/blog.php?content_selector=riaa-news-blog&content_selector=riaa-news-blog&blog_selector=Googles-Move-&news_month_filter=2&news_year_filter=2013

²⁶ <http://www.google.com/transparencyreport/removals/copyright/domains/?r=last-year>

²⁷ <http://www.google.com/transparencyreport/removals/copyright/domains/mp3skull.com/>

²⁸ <http://www.itif.org/files/2011-piracy-price.pdf>

²⁹ <http://thetrichordist.com/2013/01/28/over-50-major-brands-supporting-music-piracy-its-big-business/>



their appearance on illegal sites give visitors the impression that the sites are legitimate³⁰ creating user confusion and materially harming the music community by interfering with its core activities and fair compensation. USC Annenberg Lab showed evidence of on-going creator community exploitation³¹ and the extent of concrete damage pirate networks³² have made against the music community. Google was listed as the second largest ad network supporting pirate music sites.³³ Amazon, another music-themed string applicant for .MUSIC, .SONG and .TUNES, is Google's second largest advertiser³⁴ and an advertiser^{35 36} on Google ad-funded pirate networks.³⁷

Google receives 2.5 million weekly takedown requests and rising³⁸ – not including YouTube. Each week creators are forced to raise millions of complaints with Google and ask for infringing links to be removed. Often, even after link removal, the links re-appear. This unsustainable system of exploitation creates substantial economic harm to the music community. As a matter of fact the situation has become so detrimental to the music community and content creators that the Judiciary Committee will be conducting a comprehensive review of U.S. copyright law relating to the Internet over the coming months.³⁹

Many within the ICANN community are quick to find ways to ignore GAC's crucial advice despite countless efforts⁴⁰ made by many of us and letters⁴¹ by the Independent music community to express these concerns to ICANN over the years. The category-based approach and enhanced safeguards is not new information to ICANN applicants. Applicants should have taken these highly pertinent GAC advice issues in consideration as well as the nuances and sensitivities for each applied-for string and the community their policies impact before they applied for them. It is within GAC members' right to express their opinion on any string independently through Early Warnings or GAC to collectively give their advice on a breadth of category-based sensitive strings as expressed in the GAC Beijing Communique. GAC's advice to serve the global public interest by incorporating appropriate safeguards is further amplified by studies that a majority of consumers would favor moderate piracy enforcement to fairly compensate artists and mitigate the likelihood of material harm to the music community's legitimate interests.⁴²

In the past we have expressed our concerns for a host of issues pertaining to string-related user confusion (such as string synonyms and singulars/plurals) as well as the scientific reasoning and justifications behind ICANN staff's development of the Community Priority Evaluation 14-

³⁰ <http://www.ifpi.org/content/library/DMR2012.pdf> Page 24

³¹ http://popupirates.com/?page_id=193

³² <http://voxindie.org/ad-profits-link-to-piracy>

³³ <http://thetrichordist.com/2013/01/02/first-usc-annenberg-brand-supported-piracy-report-and-google-response/>

³⁴ <http://www.wordstream.com/articles/google-earnings>

³⁵ http://www.annenberglab.com/adminfiles/files/USCAnnenbergLab_AdReport_Feb2013.pdf

³⁶ <http://thetrichordist.files.wordpress.com/2012/09/amazonu2.png?w=600&h=366> (Ad Screenshot)

³⁷ <http://thetrichordist.com/2013/01/02/first-usc-annenberg-brand-supported-piracy-report-and-google-response/>

³⁸ <http://www.google.com/transparencyreport/removals/copyright/>

³⁹ http://judiciary.house.gov/news/2013/04242013_2.html

⁴⁰ <http://forum.icann.org/lists/comments-closed-generic-05feb13/pdf9GOH7OQex8.pdf>

⁴¹ <http://www.icann.org/en/news/correspondence/bengloff-to-crocker-et-al-06mar13-en.pdf>

⁴² <http://www.digitalmusicnews.com/permalink/2013/20130118blocking>



point scoring criteria threshold.⁴³ We agree with GAC that singulars and plurals of strings will create a likelihood of user confusion and should not be allowed to co-exist.

DotMusic urges ICANN to give GAC advice appropriate due consideration and accept it. According to ICANN, the “advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with GAC advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice” and “find a mutually acceptable solution.”⁴⁴

If GAC advice is not adopted, ICANN must clearly explain and be held accountable why such opinion - including that of the music community which is “clearly impacted by a set of new gTLD applications in contention” and “has expressed a collective and clear opinion on those applications” - has been rejected. ICANN must clarify how such rejection serves the global public interest, its Affirmation of Commitments⁴⁵ and objectives of the new gTLD Program. We do understand that some of the safeguards might not be applicable to some applications, such as brand applications. However, this does not pertain to cases in regards to sensitive strings which necessitate appropriate safeguards, governance structures and policies. Rejection of GAC advice will cause a likelihood of material harm to the music community, consumers and businesses at-large. Such inaction by ICANN could also significantly threaten governmental support for ICANN and compromise its multi-stakeholder model.

Sincerely,

Constantine Roussos
Founder

.MUSIC:

<http://music.us>

.MUSIC Supporting Music Organizations:

<http://www.music.us/supporters.htm>

⁴³ <http://forum.icann.org/lists/5gtld-guide/msg00083.html>

⁴⁴ <https://gacweb.icann.org/display/gacweb/ICANN+Bylaws>

⁴⁵ <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>