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May 13, 2016

Re: DotMusic Response to ICANN’s Draft Report on New gTLD Program Safeguards to Mitigate DNS Abuse

DotMusic appreciates the meaningful work and contributions made by a wide array of experts for drafting the *New gTLD Program Safeguards to Mitigate DNS Abuse Report*¹ (“Draft Report”), including the Anti-Phishing Working Group (APWG), the Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs) and members from the banking, financial, and Internet security communities.

DotMusic would like to provide feedback on critically-relevant DNS abuse that have not been adequately addressed in the Draft Report, including recommendations and enhanced policies to counter DNS abuse, including various malicious conduct, illegal activities and copyright infringement. For example, certain new gTLDs associated with content are experiencing significant copyright infringement and do not have meaningful safeguards to mitigate such abuse. The Draft Report does not focus on abuse of domain names used to facilitate piracy or counterfeiting. While ICANN’s role is not to police content, the registry operator implementation of various enhanced safeguards for content-based new gTLDs is necessary to promote consumer trust aligned with the consumer-focused rationale to launch the new gTLD program. DotMusic is concerned by ongoing abusive registry practices by certain new gTLD registry operators that have turned a blind eye to incorporating responsible and suitable safeguards for strings that carry a higher level of risk associated with consumer harm and invoke a higher level of implied consumer trust, especially new gTLDs that function in regulated sectors.

An issue of concern is registry and registrar compliance of enhanced safeguards. Ensuring that registry operators and registrars comply proactively with their agreements with ICANN is necessary to maximize consumer trust, mitigate DNS abuse and serve the public interest. While ICANN may be limited with respect to regulating online content and protecting copyright, ICANN certainly has a responsibility to ensure that there is compliance and enforcement of the terms of its contractual agreements with registries and registrars.

A. Background

The Affirmation of Commitments (“AoC”) states that “7. *ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.*” ...“9.1 Ensuring accountability, transparency and the interests of global Internet user...to ensure that the outcomes of its decision-making will reflect the public interest.”...“9.2 Preserving security, stability and resiliency”...“9.3 Promoting competition,

¹ <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>



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consumer trust, and consumer choice.” The AoC also mandates ICANN to “*organize a review that will examine the extent to which the... expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of...safeguards put in place to mitigate issues involved in the...expansion.*”²

Specification 11 of the New gTLD Registry Agreement mandates that registry operators commit to certain public interest commitments (“PICs”) as part of their contractual obligations with ICANN. Sub-sections 3a and 3b focus on registry operators’ PICs as an aspect of DNS abuse, and describe activities that should be included in their efforts to mitigate and track abusive behavior in their TLDs. Specification 11 states:

3a. Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.³

B. Music Community Background and Overview of New gTLD Program’s Effectiveness in Promoting Consumer Trust and Providing Adequate Safeguards to Mitigate DNS Abuse, including Copyright Protection

Pirate sites distribute illegal content and continue to steal copyrighted content and siphon millions of dollars away from the creative community, making it much harder for artists to make a living.⁴ Piracy sites are also “*being nurtured by revenues from both mainstream and high risk advertisements...These same sites – which are known to be popular with children and young people*

² ICANN Affirmation of Commitments, <https://icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

³ ICANN, Registry Agreements, <https://www.icann.org/resources/pages/registries/registries-agreements-en> and <http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>

⁴ USC Annenberg Innovation Lab, Advertising Transparency Report, <http://annenberglab.com/projects/ad-piracy-report-0>; It is noted that both .MUSIC applicants Google and Amazon have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites. *See* <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>; Also *see* USC Annenberg Lab Ad Transparency Reports: Google’s advertising networks placing second most advertisements to illicit sites at

http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_Jan2013.pdf, p.1; and Amazon advertising on infringing sites at

http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_May2013.pdf, p.2



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– are thereby exposing the latter to materials which are likely to be extremely damaging to them as well as to adults who might likewise be exposed.”⁵

The Music Community is one of the Internet’s most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.⁶ The DMCA was signed into law in 1998 with a goal of updating copyright laws for the digital age, but it's now disturbingly out of date. Many famous artists and songwriters representing the Music Community filed public comments to the U.S Congress to reform the outdated DMCA:

One of the biggest problems confronting us as songwriters and recording artists today is the Digital Millennium Copyright Act. This law was written and passed in an era that is technologically out-of-date compared to the era in which we live. It has allowed major tech companies to grow and generate huge profits by creating ease of use for consumers to carry almost every recorded song in history in their pocket via a smartphone, while songwriters’ and artists’ earnings continue to diminish. Music consumption has skyrocketed, but the monies generated by individual writers and artists for that consumption has plummeted. The growth and support of technology companies should not be at the expense of artists and songwriters. Section 512 of the DMCA has become the all-purpose shield that tech companies hide behind while they threaten the livelihood of music creators. The notice-and-takedown provision to which we refer allows ongoing infringements of the works we create since videos can immediately be re-posted, even after we have requested to have them removed. This outdated law forces us to stand by helplessly as billions of dollars in advertising is sold around illegal copies of our work. Most of the money goes to the tech services -- not to creators. In fact, according to a recently released report by the RIAA, U.S. vinyl sales generated more revenue for the music industry than ad-supported, free streaming by services like YouTube and Spotify over the past year. The DMCA actually thwarts the success of digital services that are prepared to pay musicians a living wage. These legitimate services are having a difficult time getting consumers to pay for music when illegal copies of our music are readily made available through services that hide behind the DMCA. In sum, the DMCA simply doesn’t work. It’s impossible for tens of thousands of individual songwriters and artists to muster the resources necessary to comply with its application. The tech companies who benefit from the DMCA today were not the intended protectorate when it was signed into law nearly two decades ago. We ask you to recommend sensible reform that balances our interests as creators with the interests of the companies who exploit our creations for their financial enrichment. It’s only then that consumers will truly benefit.⁷

⁵ Dr. Paul A. Watters, *An Analysis of Piracy Website Advertising in Brazil and Its Linkages to Child Exploitation Material*, http://ecpat.net/sites/default/files/Piracy%20Website%20Advertising%20in%20Brazil_ENG.pdf, December 2015, p.14

⁶ <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, see

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>

⁷ Comments of Recording Artists & Songwriters to U.S. Copyright Office, Library of Congress, *RE: Section 512 Study: Notice and Request for Public Comment*, Docket No. 2015-7. Artists included Bryan Adams, Christina Aguilera, Tony Bennett, Jon Bon Jovi, Garth Brooks Chris Cornell, Dave Matthews Band, deadmau5, Mick Fleetwood, Don Henley,



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19 major music organizations also submitted a joint brief explaining the myriad flaws in the DMCA -- a law passed during the dial-up era – and how it harms the Music Community:

The Music Community’s list of frustrations with the DMCA is long. A broken “notice-and-takedown” system. Toothless repeat infringer policies. Active services mischaracterized as passive intermediaries. Incentives for services to embrace willful blindness instead of preventing known and widespread infringement. The words “representative list” read out of the statute... Several factors have contributed to the failure of the DMCA to fulfill its purpose. To start, Congress enacted the DMCA in 1998 when dial-up Internet speeds and static web sites predominated. Soon thereafter, individuals could be worldwide publishers of content on peer-to-peer networks and service providers began to distribute massive amounts of content uploaded to their servers. And then came along more sophisticated search engines, social networks, and an explosion of smartphones and other mobile Internet access devices. The rules for service providers and tools for content creators set forth in the DMCA proved unsuitable for this new world. There is no evidence that Congress anticipated that Google or any service provider would receive and be required to respond to more than one billion takedown notices. Google wears this as a badge of honor, yet this fact emphasizes the failure of the DMCA to address the challenges faced by content owners today. Given all of these fundamental changes, a law that might have made sense in 1998 is now not only obsolete but actually harmful. The problem is compounded by the fact that, as courts, too, have struggled to apply this outdated law for the present day, DMCA has been shifted from its original intent through a series of judicial rulings to strip away adequate protection for content owners. To start, courts have expanded application of the safe harbors well beyond the passive service providers of 1998 to more active distributors of music that compete directly with services that must obtain licenses. The result: a Hobson’s Choice for content owners, either to license content for much less than it’s worth, or have the broken notice-and-takedown system as the only recourse. Is it any surprise that in this distorted marketplace revenue from sales of vinyl records outpaces revenue from on-demand, ad-supported video platforms making billions of transmissions annually? Courts have also given little meaning to key provisions for content owners in the DMCA bargain. Examples include “red flag” knowledge, repeat infringer policies and representative lists. The result: safe harbor status for services that choose to stick their heads in the sand rather than do their fair share, forcing content owners to divert valuable resources from away creating content to sending minimally effective take down notices, or for content owners with limited resources, to actually refrain from sending takedown notices at all. Content owners, especially those with limited resources, simply cannot take on the entire digital universe alone. At its worst, the DMCA safe harbors have become a business plan for profiting off of stolen content; at best,

Billy Idol, Billy Joel, Maroon 5, Bruno Mars, John Mayer, Pearl Jam, Katy Perry, Lionel Richie, Gwen Stefani, Rod Stewart, Pete Townshend, Steven Tyler, Pharrell Williams and more. *See*

<https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90800&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2-3



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the system is a de facto government subsidy enriching some digital services at the expense of creators.⁸

Many legal experts in the field of copyright law and music have reached the same conclusion:

The Safe Harbor Provisions were written to prevent isolated infringement by third parties through the use of ISPs and the notice-and-takedown provisions would have alone been an efficient alternative to legal proceedings if the Internet landscape had remained relatively same as it was in 1998. However, today, music creators are faced with the overwhelming burden of detecting these instances of infringement and notifying the service provider every single time a user posts and re-posts the work. Unfortunately, changes in the marketplace have presented the music community with the insurmountable burden of notifying ISPs for millions of instances of infringements which occur by the posting of links on thousands of unauthorized sources. After 18 years of changes in the marketplace, the balance of burdens placed on ISPs and creators to monitor for copyright infringement has greatly tipped in favor of the service providers.⁹

Although music community members can notify these services when their content is illegally posted, users (or the pirate websites) often repost the same content almost instantly, making it impossible for music community members to prevent the unauthorized distribution of their work. As such the music community is stuck using their own resources to police repeated abuse and in many cases are left bearing the costs of litigation if the service does not comply. To make matters worse, even if music community members are able to secure a judgment against rogue sites, the infringing actor responsible for hosting the site may be impossible to locate, which again leaves the music community without any remedy.¹⁰

According to the Content Creators Coalition:

The DMCA was primarily designed to prevent isolated infringement by third parties on specific online sites when connection speeds were slower than today and storage space was limited. In that environment, these third parties were not able to infringe on the massive scale that they do today, and the “takedown notice” provisions were thought to provide an

⁸ Comments of “Music Community” to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2-3

⁹ Comments of LaPolt Law to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89896&attachmentNumber=1&disposition=attachment&contentType=pdf>, p.3

¹⁰ The pirate operator usually changes domain names by continually switching to new domains under different gTLD or ccTLD extensions e.g. MP3Skull moved from MP3Skull.yoga to MP3Skull.mn to MP3Skull.vg (MP3Skull.vg is operating as of April 4th, 2016). See *RIAA Wins \$22 Million MP3Skull Judgment, But They'll Never See A Dime And The Site Is Still Online*, Hypebot.com, February 27, 2016, <http://www.hypebot.com/hypebot/2016/02/riaa-wins-22-million-mp3skull-judgement-but-theyll-never-see-a-dime-and-the-site-is-still-online.html> and *Music labels win \$22.2m damages from MP3Skull – if they can find its owners*, The Guardian, February 26, 2016, <https://www.theguardian.com/technology/2016/feb/26/music-labels-damages-mp3skull-owners>



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alternative to lengthy and expensive legal proceedings. However, it has had the exact opposite effect, leaving artists with little recourse if a legitimate takedown notice is denied. Legal representation is expensive and Section 512 does not allow for damages in all but the most egregious circumstances.¹¹ ...Instead of sending a relatively small number of “take-down” notices to prevent isolated infringement in a manner that ensures the material doesn’t reappear, musicians are instead faced with the unprecedented burden of attempting to “take-down” literally billions of infringing copies of music and associated links from thousands of unauthorized sources in an environment where infringers feel free to simply continuously repost links to the infringing content. This mismatch between the amount of infringement and the burden of enforcement has increasingly led to the devaluation of music and the perception that there is no effective remedy against unauthorized infringement. Once a song is available, authorized or not, the law provides no means to effectively protect the musicians’ property.¹² The process doesn’t work for large-scale entities, and the problem is infinitely worse for small-scale entities and individual creators.... What is expensive and difficult for large copyright owners is an impossible challenge for small copyright owners seeking to protect the value of their works from indiscriminate sharing online.¹³ As Maria Schneider, a three time GRAMMY winning jazz and classical composer, bandleader and conductor noted in describing the frustration with the DMCA, “[t]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an endless whack-a-mole game.”¹⁴

As observed by Marquette University Law School Professor Bruce Boyden:

Even for the largest media companies with the most resources at their disposal, attempting to purge a site of even a fraction of the highest-value content is like trying to bail out an oil tanker with a thimble. . . . The expenses of locating, identifying, and then sending a notice for that many files is so significant that even large companies must limit their efforts.¹⁵

This observation is confirmed by the world’s largest music company¹⁶ Universal Music Group (“UMG”):

Like many other copyright owners, UMG has been compelled to devote extraordinary resources ...and millions of dollars – including personnel expense, investments in computer

¹¹ Comments of Content Creators Coalition to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment*, Docket No. 2015-7,

<https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90917&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.10-11

¹² Ibid, p.11

¹³ Ibid, p.22

¹⁴ See Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm on the Judiciary, 113th Cong. 57 (2014) (statement of Maria Schneider).

¹⁵ For data on the quantity of notices sent by the Motion Picture Association of America, see Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a Twenty-First Century Problem*, CENTER FOR PROTECTION OF INTELL. PROP. (Dec. 5, 2013)

¹⁶ UMG has 26.5% global market share in recorded music (2010). See UMG 2011 Investor Meeting presentation, <http://vivendi.com/wp-content/uploads/2011/11/umg-investor-presentation-november-2011-final.pdf>, p.3



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hardware and software, third-party vendor expenses, and substantial contributions to trade associations – specifically and solely to protect its interests, and those of its recording artists and songwriters, against online infringement. However, notwithstanding this investment and dedication by UMG, the extent of online infringement and the rate at which it is continuing to grow, coupled with the imbalance of burdens between copyright owners and service providers under the current legal system, have rendered it impossible to fully address the massive violations of UMG’s intellectual property rights. UMG...owns or controls the copyright for millions of recordings and several million more compositions... Under the current legal regime, and the burdens it has imposed, UMG is simply unable to protect its entire catalog and the wealth of intellectual property that it represents. ...For purposes of illustration...UMG is the distributor of the Taylor Swift album “1989” which was released by her label, Big Machine Records...The magnitude of the online infringement of “1989” was massive and required significant additional steps. First, UMG adopted a policy of actively searching for and blocking the album and all but one of its tracks on YouTube, rather than monetizing that content on the YouTube platform. And second, UMG devoted additional efforts to taking the recordings down from two other sites – SoundCloud and Tumblr – which paid no royalty at all at the time, and which responded relatively quickly to takedown notices. These efforts came at a considerable cost to both UMG and Big Machine Records. A staff of UMG employees devoted essentially 100% of their time between November 2014 and February 2015 to manually search for infringements of “1989” and its tracks on YouTube and other sites, so that these unlawful uses could be blocked or taken down. These efforts were supplemented by approximately a dozen employees working for IFPI who devoted a significant portion of their work days to the same task. Since the release of the album and through March 11, 2016, UMG or its agents have had to send over 66,000 DMCA takedown notices to online sites hosting copies of “1989” or its tracks. This is in addition to nearly 114,000 blocks that were automatically put in place through YouTube’s Content ID system (described in response to No. 15 below), and nearly 30,000 additional blocks or takedowns that UMG or its agents manually placed through online interfaces that YouTube and SoundCloud make available to copyright owners. In addition, trade associations working on UMG’s behalf, including RIAA and IFPI, identified over *half a million* URLs that link to infringements of “1989” since the album was released, and requested that search engines delist those URLs.¹⁷ On the positive side, these massive efforts bore some fruit. Almost immediately, UMG and Big Machine Records began seeing evidence that consumers looking for unlicensed online copies of “1989” were unable to find them, and were thus being driven to purchase the album.¹⁸

According to the Copyright Alliance:

Sixty-eight percent of...creators...have never filed a takedown notice before because (1) they have either never heard of it; (2) it would take too much effort; (3) the process is too difficult

¹⁷ See 17 U.S.C. § 512(d), <http://www.copyright.gov/title17/92chap5.html#512>

¹⁸ Comments of Universal Music Group to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment*, Docket No. 2015-7, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90321&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp5-7



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to navigate; or (4) they are skeptical it would do anything to stop online infringement.¹⁹ Individual creators who file notices lack the resources of larger copyright owners to make a meaningful impact. Eighty-five percent of those we surveyed said they issue takedown notices all by themselves, taking time away from their creative pursuits, which pushes many to give up enforcement efforts all together. These creators are defenseless against the volume and reach of online infringement, especially in light of how easy it is to re-post something nowadays.²⁰

Furthermore, according to the British Phonographic Industry (BPI):

Concerted efforts by the wider music community to build a healthy digital market have been held back by search engines and other intermediaries continuing to direct users and revenues towards sites that defraud artists and labels. The BPI has repeatedly called on Google and others to do more to ensure that consumers searching for recorded music are referred to legal services in preference to illegal sites, many of which pose risks from viruses, trojans or other harmful or inappropriate content.²¹

Research data consistently shows that search placement plays an important role in determining where consumers go to acquire music and other entertainment. A 2014 study by the Technology Policy Institute highlighted that “*changing the prominence of pirate and legal links has a strong impact on user choices: users are more likely to consume legally (and less likely to infringe copyright) when legal content is more prominent in search results.*” The study also found that users whose initial search terms indicate an intention to consume pirated content are more likely to use legal channels when pirated content is harder to find in search results.²²

According to WIPO, cybersquatting cases were up in 2015 driven by new gTLDs.²³ Spamhaus also revealed that “*world’s worst top-level domains*” are new gTLDs stating that “*unsurprisingly, most of the TLDs listed on this page are the “new gTLDs” recently introduced by ICANN.*” Spamhaus released these findings “*in hope that this data can help the “Good” Powers That Be (starting with ICANN) to better focus their attention on network abuse issues, aiming for a better tomorrow for our Internet.*”²⁴

¹⁹ Comments of Copyright Alliance to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89991&attachmentNumber=1&disposition=attachment&contentType=pdf>, p.8

²⁰ Ibid, p.9

²¹ <https://www.bpi.co.uk/media-centre/urgent-reform-needed-to-notice-and-takedown-as-removal-of-200-millionth-illegal-search-result-from-google-approaches.aspx>

²² <https://techpolicyinstitute.org/2014/09/15/search-impact-on-piracy>

²³ http://wipo.int/pressroom/en/articles/2016/article_0003.html

²⁴ <https://www.spamhaus.org/news/article/728/spamhaus-presents-the-worlds-worst-top-level-domains> and <https://www.spamhaus.org/statistics/tlds>, and <http://www.csoonline.com/article/3041346/security/maintainers-of-new-generic-top-level-domains-have-a-hard-time-keeping-abuse-in-check.html>



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An ICANN-sponsored survey also reported that consumer trust in new gTLDs is much lower than in legacy TLDs, with approximately 50% of consumers reporting trust in new versus approximately 90% reporting trust in legacy TLDs.²⁵ Researchers from the University of California, also found that new TLD domains are more than twice as likely as legacy TLDs to appear on a domain blacklist.²⁶ Further, according to the Anti-Phishing Working Group, malicious actors are testing the new gTLD space as a potential base for their activities.²⁷

Cybersecurity firm RiskIQ found that one out of every three content theft sites exposed users to malware. Internet users who visited content theft sites were 28 times more likely to get malware from these sites than from mainstream websites or licensed content providers.²⁸ According to the IP Commission Report, such abuse has significantly negative effects on consumers, economies, industry and government:²⁹

- *Effects on consumers.* Harm to health, harm to safety, costs incurred as a result of product failure, decreased or increased purchasing power;
- *Effects on economy as a whole.* Decline in economic growth as incentives to innovate are reduced, lost trade revenue, impact on the environment; increase in companies with substandard working conditions;
- *Effects on industry.* Lost sales; lost brand value; reduced scope of operations; lost jobs and reduced ability to provide employee benefits; reduced ability to conduct R&D; increased IP protection expenses for prevention, remediation, and enforcement; increased costs from dealing with malware; reduced incentive to innovate; and
- *Effects on government.* Lost tax revenue; increased IP protection expenses for prevention, remediation, and enforcement, including costs to store, secure, and destroy seized assets; benefit to criminal networks looking to launder money or harm the public; impact on national security; and impact on civilian safety.

According to ICANN, DNS abuse refers to intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS³⁰ to “*exploit human weaknesses in the forms of greed, carelessness, and/or naiveté. Thus, end-users tend to be the weakest links in the cyber-security*”

²⁵ ICANN Global Consumer Research, conducted by Nielsen, April 2015, <https://www.icann.org/news/announcement-2015-05-29-en>

²⁶ “From .academy to .zone: An Analysis of the New TLD Land Rush,” University of California, San Diego, Department of Computer Science and Engineering, October 2015, doi: 10.1145/2815675.2815696, <http://www.sysnet.ucsd.edu/~voelker/pubs/newtlds-imc15.pdf>, p.12

²⁷ Anti-Phishing Working Group, “Global Phishing Survey: Trends and Domain Name use in 1H2014,” 25 September 2014, http://docs.apwg.org/reports/APWG_Global_Phishing_Report_1H_2014.pdf; Also see <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>, p.12

²⁸ <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=digitalbait>

²⁹ IP Commission Report, http://ipcommission.org/report/IP_Commission_Report_052213.pdf, 2013, p.29

³⁰ <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>, p.3



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*chain.*³¹ According to ICANN, “DNS abuse can take a number of forms, its typical aim is to distribute malware, which is used to disrupt computer operations, gather sensitive information, or gain access to private computer systems.”³² According to cybersecurity organization IID, “most new gTLDs have failed to take off and many have already been riddled with so many fraudulent and junk registrations that they are being blocked wholesale.”³³

Google’s Transparency Report³⁴ shows that there is widespread copyright infringement and millions of takedown requests for New gTLDs that have music-themed characteristics, such as .ROCKS (which only has 65,047 domain registrations³⁵). Infringing .ROCKS domain names include: *torrents.rock*s (with 1,145,272 copyright infringement takedown requests), *extratorrent.rock*s (940,971), *kickassstorrents.rock*s (561,065), *kickasstorrent.rock*s (507,161), *kickass-torrent.rock*s (434,016), *kickass-torrents.rock*s (348,910), *kickassstorrentz.rock*s (361,161), *thepiratebay.rock*s (264,147), *kickass.rock*s (263,673), *mp3song.rock*s (208,260) and many others retrieved on March 31 2016.³⁶ During the week of February 29, 2016 there were 21,064,571 URL takedown requests for copyright infringement removal (i.e. 125,384 takedowns per hour).³⁷

A content/copyright-based new gTLD is a “string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;” and (ii) that it is a “string that is linked to [a] regulated sector” that “should operate in a way that is consistent with applicable laws,”³⁸ Without community-based enhanced safeguards in place, a content/copyright-based string that invokes a high level of implied trust will be significantly abused by bad actors and experience rampant piracy to the detriment of the Internet as whole.

“The public good fully coincides...with the claims of individuals,” wrote James Madison of the Constitution’s Copyright Clause, which secures the exclusive rights of creators. These rights, like any form of private property, serve as the building blocks of a free market, promoting economic growth and individual liberty. Madison’s remarks remain just as true after more than two hundred years. “The issues of authors are intertwined with the interests of the public,” wrote Register of Copyrights Maria Pallante last year. “As the first beneficiaries of the copyright law, authors are not

³¹ Ibid p.10; Khonji, Mahmoud and Youssef Iraqi, “Phishing Detection: A Literature Survey,” IEEE Communications Surveys & Tutorials 15, no. 4 (Q4 2013), doi: 10.1109/SURV.2013.032213.00009,

<http://ieeexplore.ieee.org/xpl/articleDetails.jsp?arnumber=6497928>

³² “Implementation Advisory Group for Competition, Consumer Choice, and Consumer Trust (IAG-CCT): Final Recommendations on Metrics for CCT Review,” 26 September 2014, <https://newgtlds.icann.org/en/reviews/cct/iag-metrics-final-recs-26sep14-en.pdf>, p.4

³³ <http://internetidentity.com/press-release/iid-predicts-massive-botnet-takeover-of-iot-devices-by-2017>

³⁴ <https://www.google.com/transparencyreport/removals/copyright>

³⁵ <https://ntldstats.com/tld/rocks>, Retrieved on March 16, 2016

³⁶ See .ROCKS Google Transparency Reports

³⁷ <https://google.com/transparencyreport/removals/copyright>, Retrieved March 19, 2016; Also see

<http://techtimes.com/articles/139220/20160307/google-copyright-takedowns-has-increased-about-one-billion-percent-since-2006.htm>, <https://torrentfreak.com/google-asked-remove-558-million-pirate-links-2015> and

<https://torrentfreak.com/google-asked-to-remove-100000-pirate-links-every-hour-160306>

³⁸ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, Annex 5, p.8



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a counterweight to the public interest but are instead at the very center of the equation.” Pallante also noted that “a law that does not provide for authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public.”³⁹

Copyright benefits the public by creating a marketplace for creative and expressive works. [For example, in the U.S] this marketplace currently contributes over \$1 trillion a year to U.S. GDP, directly employs 5.4 million people (with average wages 33% higher than national average), and generates \$141 billion in exports. The existence of this marketplace further incentivizes the creation and dissemination of works which promote the progress of art, science, culture, and knowledge. Consumers experience this benefit firsthand. Millions of consumers are able to enjoy music on numerous platforms that did not exist even a decade ago.⁴⁰

The public benefits of a robust copyright system are not solely economic. Copyright protects human rights. Article 27 of the Universal Declaration of Human Rights (UDHR),⁴¹ adopted in 1948 by the UN General Assembly, states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Copyright also advances free speech values. The Supreme Court has said that “*the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.*”⁴² Indeed, creators and the creative communities are on the front lines defending their—and by extension everyone’s—right to free expression.

As indicated earlier, ICANN’s Articles of Incorporation commit ICANN to “*carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.*” As such, ICANN’s Articles apply to any content/copyright-based gTLD, a “*string that is linked to regulated sector.*”⁴³

Furthermore, ICANN has a number of policies and obligations concerning their relationship with the Internet user. These include issues such as “*competition, consumer protection, security, stability*

³⁹ https://copyrightalliance.org/2014/03/copyright_public_interest_and_free_trade

⁴⁰ Ibid

⁴¹ <http://www.un.org/en/universal-declaration-human-rights/index.html>; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework,

http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, p.5

⁴² http://scholar.google.com/scholar_case?case=12801604581154452950

⁴³ <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2



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and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”⁴⁴ According to the KnujOn Report “Concerning issues of consumer trust on the Internet as they apply to ICANN, the ICANN Compliance function, ICANN registries, and ICANN registrars (March 2016):”

ICANN is not connecting to consumers, but the abusive parties are connecting to consumers. So what the consumer sees is the ugly side of the Internet. The actual access to ICANN’s complaint or compliance process is hidden. ICANN’s website structure appears designed to avoid accepting complaints from consumers and deflecting any responsibility to external entities. Whether by design or negligence, the problem needs to be addressed immediately. Obfuscation and misdirection are not strategies for gaining consumer trust.⁴⁵

Significant abuse and material harm to consumers and the Music Community will be prevented if DotMusic’s community initiative is granted .MUSIC. DotMusic’s community-based enhanced music safeguards will protect the popular and sensitive .MUSIC string. According to ICANN:

ICANN is not the content police.⁴⁶

Complaints regarding copyright infringement due to Internet and website content are outside of ICANN’s scope and authority.⁴⁷

However, such statements in relation to ICANN’s authority do not release ICANN of serious accountability and responsibility towards serving the public interest and making decisions within its control and authority to maximize consumer trust via the implementation of reasonable and suitable enhanced safeguards by registry operators managing sensitive strings. As evidenced previously, if content/copyright-related gTLDs do not have adequate community-based enhanced safeguards then pirates and bad actors will continue to materially abuse the Music Community and compromise consumer trust. Such malicious conduct will proliferate even further because of the loophole that deters meaningful copyright enforcement compliance because copyright protection is not within ICANN’s authority.

In agreement with the FTC (that “*expressed concerns about the need for more consumer protection safeguards...highlighting again the potential for significant consumer harm...magnify[ing] both the abuse of the domain name system and the...challenges...in tracking down Internet fraudsters*”⁴⁸), a safe, secure and trusted content/copyright-related gTLDs with community-tailored enhanced

⁴⁴ See Competition, Consumer Trust and Consumer Choice Review (CCT), <https://icann.org/resources/reviews/aoc/cct> and ICANN Affirmation of Commitments, <https://icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

⁴⁵ KnujOn March 2016: Internet Limbo, <http://www.knujon.com/knujon-icann-consumers-rygy-limbo-032016.pdf>, p.56

⁴⁶ <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>

⁴⁷ <https://www.icann.org/resources/pages/copyright-2013-05-03-en>

⁴⁸ See https://www.ftc.gov/sites/default/files/documents/public_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf and <https://www.ftc.gov/news-events/press-releases/2011/12/ftc-warns-rapid-expansion-internet-domain-name-system-could-leave>



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safeguards that enforce copyright protection and protect the global music community and enhance consumer trust is of paramount significance.

The Music Community would benefit from enhanced safeguards to promote consumer trust and protect the DNS from abuse. As outlined by the Motion Picture Association of America (“MPAA”), there are many “areas where collaboration is urgently needed:”

One area involves domain names utilized by websites that are notorious havens for piracy. Internet users can and do find infringing content through websites operated under domain names that gain a reputation for offering pirated content. A notorious example of this is The Pirate Bay, which operates at www.thepiratebay.se, and which provides a massive online index to BitTorrent files and P2P infringing files. Under the terms of their accreditation agreements with ICANN, most domain name registrars and registries are required to include terms of service that forbid the direct or indirect use of domain names for illegal purposes, including infringement. But those provisions are almost never enforced, and reports of rampant copyright infringement committed and/or facilitated by websites associated with such domain names go largely unaddressed. Furthermore, ICANN appears unwilling to enforce the terms of those agreements to ensure that registrars and registries investigate and respond appropriately to complaints of abuse. Registrars and registries must therefore work with content owners to put policies and systems in place to prevent domain names from being used as vehicles for copyright infringement... An additional area involving domain names where there is more work to be done is the publicly accessible Whois database of contact information on domain name registrants. The Whois database is an essential investigative tool for identifying online pirates and taking enforcement action against them. Effective enforcement has been plagued by problems, including, notably, the rise of proxy registration services. Such services have effectively hidden the needed contact details for a quarter or more of all registrations in the generic Top Level domains. The ICANN Board—steward of Whois for the past 15 years—currently has before it a proposal to bring greater transparency and predictability to the proxy registration marketplace. The proposal would establish minimum standards proxy services must follow to maintain accurate contact records for their customers and to reveal that data in response to well documented complaints that the domain name corresponding to the proxy registration has been used for clearly infringing activities. Approval and effective implementation of this proposal will help the MPAA’s members and other right holders to recover Whois as a key part of their toolkit for addressing pervasive online piracy sites. Further steps are needed to improve the accuracy and accessibility of Whois data, especially in light of ICANN’s current effort to replace the technologically outmoded Whois protocol and service with a new system for collecting and disclosing contact information for gTLD domain name registrants.⁴⁹

Such collaboration is consistent with ICANN’s Articles of Incorporation, which mandate ICANN to

⁴⁹ Comments of the Motion Picture Association of America, to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90285&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.27-28



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be “in conformity with relevant principles of international law and applicable international conventions” and to “cooperate with relevant international organizations:”

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.⁵⁰

C. DotMusic Recommendations for Content/Copyright-related new gTLDs and other Types of Sensitive, Regulated Strings

As expressed by some Expert Panelists, the New gTLD Program in general “fail[s] to offer protection for identifiers that are not trademarks and registered with a clearinghouse. Under various applicable laws...many such names and brands cannot be trademarked, as they are non-commercial activities.”⁵¹ There would also be a “likelihood of material harm to the...community (in this case the music community) due to the absence of any meaningful controls and separation in the governance structure.”⁵² Any New gTLD Program Registry Operator that does not have the appropriate multi-stakeholder governance or necessary ties to the string’s community would create material harm because the competitors’ “operation of the string would interfere with the core activities” (in this case the music community’s primary activities that are reliant on the DNS⁵³), including harm from the “prospect of losing to speculators domain names corresponding to non-trademarked identities.”⁵⁴

Furthermore, the “use of the string [associated with a regulated sector]...leads to the presumption that the user is a member of the...[regulated] community, and as such, within the regulatory umbrella of mandatory restrictions and protections. A consumer dealing with an entity perceived as a member of the [regulated] community may assume that such member acts within the context of its regulated activity, and that products or services contracted are made subject to the applicable regulations.”⁵⁵ “There is likelihood that entities using the string assume the appearance of being subject to the relevant consumer-protective regulations, with the aim of taking advantage from the

⁵⁰ ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

⁵¹ Mark Kantor, New gTLD Expert Panelist, Case No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), <https://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1612-2805-en.pdf>, ¶ 96, p.23

⁵² Ibid, ¶ 76, p.20

⁵³ Most music-related consumption now occurs online given the exponential growth of the Internet in supporting and encouraging communication, participation and commercial/non-commercial music community activities. See <http://billboard.com/articles/business/7332929/ifpi-global-digital-music-services-revenue-growth-report>

⁵⁴ Mark Kantor, New gTLD Expert Panelist, Case No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), <https://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1612-2805-en.pdf>, ¶ 98, p.24

⁵⁵ Juan Fernández-Armesto, New gTLD Expert Panelist, CASE No. EXP/432/ICANN/49, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1512-20834-en.pdf>, ¶ 177, p.34



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confusion created in the mind of the end user. This can only result in harm to the consumer and to the reputation of the internet activity of the [regulated] community. If at present there already is a substantial number of malicious domain registrations on the basis of second level registrations, it is likely that the reliance placed by the consumers on the gTLD domain [associated with the regulated community] will increase the level of malicious use.”⁵⁶ While many registries “have not broken any rules or requirements in applying for [regulated] strings...[their]...lack of an existing relationship with the [associated community] is sufficient by itself to create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the [associated] community.”⁵⁷ “It is extraordinarily difficult to have familiarity with...[the] regulatory environment when one has no relationship with the [associated] community” linked to a regulated sector.⁵⁸ Other New gTLD Experts also have determined that for professional sectors that require a license, “the use of a top-level domain name by non-licensed [registrants] is in itself an abuse...Therefore all safeguards must be adopted to prevent its use by non-licensed persons. Otherwise the door would be open for abuse.”⁵⁹

Moreover, allowing registrations from users who do not have any legitimate interest in the string’s inherent subject-matter would also create the likelihood of material harm to the associated community if there is a “*strong association between the...community (in this case the music community) and the particular string (in this case .MUSIC).*”⁶⁰ The New gTLD Program “*presumes that only registered trademarks are properly entitled to protections. While that may be true for generic domains, it is an overstatement with respect to gTLDs strongly associated with a particular global community. Small, resource-poor and noncommercial participants in a community require protection as well as larger commercial enterprises.*”⁶¹ Registry operators that manage sensitive strings associated with communities without community-vetted governance and community-tailored safeguards lack accountability. New gTLD Expert Panelists conclude that when there is “*strong dependence of the...Community on such a domain name*”⁶² strongly associated with the community that relies on the DNS for primary activities, “*the risk of economic damages which would be inflicted...due to the operation of the gTLD by an unaccountable registry shows a reasonable level of certainty and could not be avoided.*”⁶³

⁵⁶ Ibid, ¶ 178, pp.34-35

⁵⁷ Mark Kantor, New gTLD Expert Panelist, CASE No. EXP/389/ICANN/6, <https://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-1-1-1053-59307-en.pdf>, ¶ 159, p.31

⁵⁸ Ibid, ¶ 160, p.31,

⁵⁹ Andreas Reiner, New gTLD Expert Panelist, CASE No. EXP/384/ICANN/1, <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1342-7920-en.pdf>, ¶ 147, p.51

⁶⁰ Juan Fernández-Armesto, New gTLD Expert Panelist, CASE No. EXP/432/ICANN/49, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1512-20834-en.pdf>, ¶ 99, p.24

⁶¹ Ibid, ¶ 100, p.24

⁶² Professor Dr. Guido Santiago Tawil, New gTLD Expert Panelist, Case No. EXP/471/ICANN/88, <https://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-1174-59954-en.pdf>, ¶ 162, p.22

⁶³ Ibid, ¶ 160, p.22



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There is nothing in the Guidebook or elsewhere to suggest that detriment of the type that the community already suffers from abuse of the existing TLDs should be disregarded for these purposes. And in any event, the operation of the new TLD...would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the...community to identify and try to take action against such abuse).⁶⁴ The Expert also considers that the...community has a "legitimate interest" in promoting [its] values, image and integrity and in ensuring the public has confidence in its readiness, willingness and ability to do so...Therefore [it] is correct that use of [a community] gTLD will give the related website an "aura of official sanction," the Expert would agree that a likelihood of detriment to the legitimate interests of the...community has been established," especially if there is "a strong association between the gTLD and [a] community, in that the word will call to mind for most people the...[community] organised, promoted and developed" by the community in question.⁶⁵

Other New gTLD Experts have opined that inadequate safeguards for strings associated with a regulated sector (such as music's regulated copyright-related sector) will result in DNS abuse detrimental to those communities associated with those sensitive strings. General new gTLD policies that only provide minimum safeguards that just comply with law "are reactive, tending to remedy any breach of such safeguards by the relevant operator after the fact. While this may affect the wrongdoer, it will not remedy the harm done to the affected consumers, nor the general loss of trust for legitimate on line [community] activities."⁶⁶

Appropriate enhanced safeguards to protect copyright, promote consumer trust and mitigate DNS abuse for content/copyright-related gTLDs include incorporating multi-stakeholder governance structure representing all constituent types and community-tailored policies that serve a higher purpose. An example is DotMusic's .MUSIC community application that:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);⁶⁷
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;

⁶⁴ Jonathan Taylor, New gTLD Expert Panelist, Case No. EXP/421/ICANN/38, <https://newgtlds.icann.org/sites/default/files/drsp/27jan14/determination-1-1-1636-27531-en.pdf>, ¶ 48.1, p.20

⁶⁵ Ibid, ¶ 48.3, p.20

⁶⁶ Juan Fernández-Armesto, New gTLD Expert Panelist, CASE No. EXP/432/ICANN/49, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1512-20834-en.pdf>, ¶ 176, p.34

⁶⁷ See Expanding multi-stakeholder Board at <http://music.us/board>



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6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

Aligned with its community-based mission, policies and its Public Interest Commitments (“PIC”) to serve the public interest,⁶⁸ DotMusic’s Application is the only applicant with music-tailored enhanced copyright protection safeguards to mitigate DNS abuse and promote consumer trust, which include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question.
- **Take Down Policies**: DotMusic will require all registrants on .music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies. Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that “content that they otherwise have the right to post” means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee.

⁶⁸ DotMusic community-based Application for .MUSIC, Answer to Question 20E, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>; Also See PIC, Commitments 1-8, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, pp.1-2; PIC, pp.22-27



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- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic’s Name Selection policy (mandating that the domain is the name of the registrant, their acronym, “doing business as,” description of their mission or activities) and discloses the beneficial registrant as per DotMusic’s Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.⁶⁹

Such policies, incorporated by registries and registrars with efficient compliance and proactive enforcement, would be effective to combat piracy in content-related gTLDs and mitigate DNS abuse, while at the same time serve the public interest by increasing consumer trust. Registry operators of strings in regulated sectors that lack a defining purpose to serve the legitimate interests of the community associated with such gTLDs will be unable to effectively maximize consumer safety and promote consumer trust.

How do we ensure that bad actors do not run registries?

Recommendation 1: Vet registry operators through background checks to reduce the risk that a potential registry operator has been party to criminal, malicious, and/or bad faith behavior.

DotMusic recommends that background checks should be repeated after a reasonable amount of time to ensure compliance. Furthermore, the Draft Report misses the most important solution to increase consumer trust and mitigate DNS abuse: selecting the vetted, qualified and responsible registry operators with suitable policies customized to the particularities of each string in question. With respect to strings functioning in a regulated sector, DotMusic recommends incorporating meaningful binding Public Interest Commitments (“PIC”) to better enforce string-specific appropriate enhanced safeguards that are aligned with each string’s regulated sector. For general strings that are not bound by a regulated sector, reasonable enforcement by ICANN is critical, including strict registry agreement monitoring and compliance towards registry operators who are found to engage in abusive practices or have a history of DNS abuse. Ongoing monitoring and enforcement of existing agreements with registry operators would also alleviate DNS abuse concerns concerning bad actors running registries. Without such measures, appropriate controls and

⁶⁹ DotMusic community-based Application for .MUSIC, Answer to Question 20E, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27



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benchmarks to consider levels of effectiveness, there would be unintended consequences against the legitimate interests of consumers, rights holders and the Internet users.

How do we ensure integrity and utility of registry information?

Recommendation 2: Require Domain Name System Security Extension (DNSSEC) deployment on the part of all new registries to minimize the potential for spoofed DNS records.

DotMusic recommends that quality control mechanisms are incorporated in deployment to measure safeguard effectiveness and to ensure that DNS records and information are trustworthy, reliable and secure.

Recommendation 3: Prohibit "wild carding" to prevent DNS redirection and synthesized DNS responses that may result in arrival at malicious sites

Recommendation 4: Encourage removal of "orphan glue" records to minimize use of these remnants of domains previously removed from registry records as "safe haven" name server entries in the TLD's zone file that malicious actors can exploit.

How do we ensure more focused efforts on combating identified abuse?

Recommendation 5: Require "Thick" WHOIS records to encourage availability and completeness of WHOIS data.

Clear and transparent processes, controls and measures to quickly and effectively eliminate DNS abuse are necessary. "Thick" WHOIS records that employ consistent standards and accurate contact information are critical safeguards for registry operators to expedite appropriate response and action to resolve security complaints and issues efficiently. Measures to increase the accuracy of "Thick" WHOIS will also help both rights holders and law enforcement better respond to DNS abuse to mitigate malicious activity.

Recommendation 6: Centralize Zone File access to create a more efficient means of obtaining updates on new domains as they are created within each TLD zone.

DotMusic recommends two-step phone and email authentication to mitigate malicious conduct by bad actors and to increase consumer safety and trust.

Recommendation 7: Document registry and registrar-level abuse contacts and policies to provide a single point of contact to address abuse complaints.

DotMusic recommends a universal database location in which such information is stored and managed and updated regularly to enable better communication and resolution of complaints and issues concerning abuse.



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Recommendation 8: Provide an expedited registry security request process to address security threats that require immediate action by the registry and an expedited response from ICANN.

DotMusic also recommends incorporating appropriate response times for registrars and registries to address abuse complaints in a timely manner to mitigate DNS abuse and prevent such abuse from escalating further.

How do we provide an enhanced control framework for TLDs with intrinsic potential for malicious conduct?

Recommendation 9: Create draft framework for a high security zone verification program to establish a set of criteria to assure trust in TLDs with higher risk of targeting by malicious actors—e.g. banking and pharmaceutical TLDs—through enhanced operational and security controls.

While it is critically important in determining how to systematically ensure that TLDs with intrinsic potential for malicious conduct – such as those relating to banking and pharmaceutical are protected against abuse, there are limited standard safeguards that have been adopted for application across the DNS, especially in the realm of copyright. Instead, as a safeguard, individual registries have been encouraged to develop their own independent means for protecting against abuse that would apply to their gTLD’s particularity. The Draft Report generally proposes evaluation of the “successful adoption, implementation, and verification of a high security zone in [TLDs] with a high potential for malicious activity...representing the banking/financial and pharmaceutical sectors.” DotMusic agrees that the CCT-RT should evaluate these high-risk TLDs but DotMusic reminds the CCT-RT that the High Security Zones in new gTLDs have not been defined or mandated for many sensitive strings and thus is limited in scope. For example, one of the most popular destinations on the Internet that are subject to abuse relate to pirate websites. In addition to mass copyright infringement, these pirate websites engage in other types of DNS abuse and malicious activity that have the same negative effect and rampant abuse at a larger scale given the significant traffic they receive.

DotMusic recommends enhanced safeguards for content/copyright-related strings that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others (See earlier section: *DotMusic Recommendations for Content/Copyright-related new gTLDs*). While piracy may never be eliminated completely, many steps can be taken by registries and registrars to mitigate consumer harm and protect the legitimate interests of rights holders. ICANN’s role as the governing body of the DNS and regulator of the domain space is to create an environment that serves the public interest and thwarts abuse. While ICANN may not be the content police, ICANN does have a responsibility in delegating “sensitive” strings to Registry Operators with appropriately-tailored and meaningful safeguards customized to safeguard riskier gTLDs and protect the general public. Taking a “one size fits all” approach does little to effectively mitigate abuse and increase consumer trust. A case-by-case approach of sensible policy-making and compliance is necessary for each string that is associated with risky activities or abuse.



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D. Conclusion

As outlined by public comments filed by the Music Community to U.S. Congress in relation to ICANN:

Registrars/Registries: ICANN must play a central role to encourage increased cooperation among copyright and trademark holders and domain name registration businesses, in order to have an impact on limiting infringement. In the current transition context, ICANN needs to demonstrate publicly its stated commitment to accountability and the rule of law. Beyond encouraging voluntary initiatives and discussions, there should be explicit statements that confirm as part of ICANN's core mission its authority to negotiate and enforce its contracts with registrars and registries – including contractual provisions targeting abusive uses of domain names. In 2013, revision of the Registrar Accreditation Agreement (“RAA”) resulted in domain name registrars taking on important new obligations to respond to complaints that domain names they sponsor are being used for copyright or trademark infringement, or other illegal activities. But registrars are not properly responding, and to date ICANN is not taking action to clarify and enforce these RAA provisions. We anticipate the same may be true in connection with rogue sites on new gTLDs. In addition, the 2013 RAA also set in motion long-overdue steps toward developing standards for the widespread phenomenon of proxy registration services. Further progress will be critical if the role of the Whois database in advancing online accountability and transparency is to be saved.⁷⁰

ICANN can play a pivotal role in mitigating DNS abuse, promoting consumer trust and serving the public interest by creating an environment that protects the legitimate interests of at-large rights holders and the global music community to enhance creativity, safety and innovation, which is in the best interest of the entire Internet ecosystem. While many general safeguards are effective for certain generic new gTLDs, custom community-tailored enhanced safeguards are required to address DNS abuse and increase consumer trust in sensitive strings linked to a regulated sector that invoke a level of implied trust from consumers that carry higher levels of consumer harm risk.

According to the Draft Report, the term *DNS abuse* is related “to intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS and/or the procedures used to register domain names.”⁷¹ It is noted that a significant portion of DNS abuse, which facilitates malware proliferation and illegal activity, occurs on copyright-infringing websites. Yet, the Draft Report has not fully investigated and addressed the strong correlation between copyright-infringing domain names and DNS abuse. It is reminded that Section 3a of ICANN's New gTLD Registry Agreement Specification 11 mandates that registry operators commit to certain public interest commitments to “prohibit[] Registered Name Holders from...copyright infringement or otherwise engaging in

⁷⁰ Comments of “Music Community” to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, Appendix C, p.17

⁷¹ New gTLD Program Safeguards to Mitigate DNS Abuse Draft Report, *DNS Abuse: Key Terminology*, <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>, p.3



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activity contrary to applicable law.” For DNS abuse to be effectively mitigated to the maximum extent possible, ICANN must also make sure that Registry Agreement compliance to Specification 11 is strictly enforced.

DotMusic recommends that additional studies from independent vendors and experts to be undertaken to provide reliable, meaningful and insightful statistical research, findings and analysis. DotMusic also recommends that the CCT-RT’s report deadline and schedule be appropriately adjusted as necessary to allow more effective and meaningful feedback, study and analysis.

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