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November 3, 2015

Dr. Steve Crocker, Chairman of the ICANN Board;  
 Fadi Chehadé, ICANN President & CEO;  
 Akram Attallah, ICANN President of Generic Domains Division;  
 Christine Willett, ICANN Vice-President of gTLD Operations;  
 Cherine Chalaby, ICANN Chair of the New gTLD Committee;  
 Thomas Schneider, ICANN Chair of Government Advisory Committee;  
 Cyrus Namazi, ICANN Vice-President of DNS Engagement;  
 John Jeffrey, ICANN General Counsel; and  
 Community Priority Evaluation Panel, Economist Intelligence Unit

**Re: Response to Obstruction to .MUSIC Community-based Application<sup>1</sup>**

I write on behalf of DotMusic Limited (hereinafter “Dot Music” or “Applicant”), regarding the Community Priority Evaluation (“CPE”) for Application No. 1-1115-14110 (the “Application”).<sup>2</sup> We appreciate that CPE is a serious undertaking that requires close evaluation of the Application. The CPE process is designed to protect communities, and, in accordance with CPE Guidelines, it is important to guard against spurious and irrelevant “opposition.”

Throughout this process, patterns of “opposition” have evolved and have become commonplace before CPE commences for all CPE applicants in the New gTLD Program. In the case of DotMusic, the spurious opposition letters (the “Letters”)<sup>3</sup> were filed during the two weeks following DotMusic’s invitation to CPE on July 29, 2015, which should raise suspicion and be considered in the proper context.<sup>4</sup>

<sup>1</sup> <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392>, DotMusic Limited Application ID 1-1115-14110

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

<sup>3</sup> <https://www.icann.org/en/system/files/correspondence/moody-to-crocker-et-al-12aug15-en.pdf> (Donuts and IP Justice)  
<https://www.icann.org/en/system/files/correspondence/hammock-to-crocker-et-al-12aug15-en.pdf> (Rightside)  
<https://www.icann.org/en/system/files/correspondence/nash-to-crocker-et-al-11aug15-en.pdf> (NashStrutton)  
<https://www.icann.org/en/system/files/correspondence/hutcherson-to-crocker-et-al-07aug15-en.pdf> (Jarvee Hutcherson)  
<https://www.icann.org/en/system/files/correspondence/nair-to-crocker-et-al-04aug15-en.pdf> (Nair band, self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12812> (Cyrus Habib, self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12806> (David Hoffman, self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12804> (Neil Anderson, self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12795> (Pan American School of Bahia)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12794> (Renee Codsi - self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12783> (Marcel Honore - self)  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/12780> (Marcus Edward Ellison - self)

<sup>4</sup> <http://newgtlds.icann.org/en/applicants/cpe>



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This submission addresses an obstruction campaign that appears, based on information and belief, to be an effort by .MUSIC competitors to provide “template” opposition comments and “talking points” to their allies to submit opposition letters. The Letters are misinformed and spurious, and have been filed for the purpose of obstruction and anti-competitive reasons. Therefore, it is respectfully submitted that the Letters filed just prior to the commencement of DotMusic’s CPE should not be considered relevant.

As specified in Section 4.2.3 of the Applicant Guidebook, we submit that the Letters should not be considered relevant opposition during the CPE grading of DotMusic’s Application because:

#### 1) Timing of Opposition Letters

The Letters were filed during the two (2) weeks after DotMusic’s invitation to CPE, which should be considered suspicious actions if one considers that Community applications have been the subject of what is by far the longest public comment period in ICANN history.

The DotMusic application has been open for public comment since 2012 -- nearly 3.5 years. Reasonably, one would expect that any truly concerned organization or entity would have voiced their opinions years ago when the application was first published. Considering DotMusic’s extensive public outreach and strong presence at ICANN meetings and other related-events, it is not plausible that these late actors have a genuine concern.<sup>5</sup> As with any “good faith” concern, DotMusic would have deliberated with the concerned party to establish whether making changes in the application were necessary to accommodate that party if the broader community agreed through an application change request process. DotMusic has not received any such communication by any of these parties during the last 3.5 years. Moreover, as noted in Section 5 below, in all cases the opposition misreads the application.

As such, letters received at the “eleventh hour” should be considered within the correct context. Furthermore, no formal Community Objections were filed against DotMusic during the Community Objection period, which is now time-barred. Hence, one may also conclude that if there was any genuine opposition against DotMusic’s application then there was ample time to file a formal Community Objection with ICANN’s Community Objection dispute resolution provider, the International Chamber of Commerce.<sup>6</sup>

2) Furthermore, all the Letters were submitted and orchestrated by competitors, their allies and entities with a current or previous association with .MUSIC competitors.

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<sup>5</sup> <http://music.us/events>

<sup>6</sup> A Community Objection could have been filed with the ICC by the 13 March, 2013 deadline (nearly a year after DotMusic’ application was publicized) if an Objector alleges that there is “substantial opposition to the gTLD application from a significant [i.e. non-negligible] portion of the community to which the gTLD string may be explicitly or implicitly targeted.” See <http://iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/how-to-file-an-objection>



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A close observation of the Letters reveals that the content was either provided in template form by Donuts or was created in partnership with Donuts.<sup>7</sup>

According to the CPE Guidelines, the EIU is instructed to ensure no such conflict of interest exists:

*The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest.*<sup>8</sup>

*The following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators must ensure that no conflicts of interest exist.*<sup>9</sup>

### 3) Inconsistent and Misleading Statements

One of the Letters filed by Rightside, Donuts' co-applicant for .MUSIC, disingenuously states that "*it is preposterous...to claim that there exists a "music community."*"<sup>10</sup> which is defined by DotMusic as a "delineated and organized logical alliance of music communities." Such statements are inconsistent with public marketing material for promoting the .BAND music-themed gTLD, which is operated by Donuts and Rightside. Marketing material clearly mentions promotions to "music communities" (Pg.2).<sup>11</sup> Another .BAND Marketing Kit also refers to the "music sector," organizing it according to delineated music community types, such as record companies, publishing, and "other music-related sectors" (Pg.6). The Kit also refers to and recognizes many music communities and organizations that have supported DotMusic e.g. BMI, ASCAP, Reverbnation, A2IM, BPI, NMPA, IFPI, Harry Fox, NARAS, PRS, RIAA, SESAC and many others (Pg. 1, 2, 3, 9, 10). The Kit also quotes the IFPI a few times as an authoritative source for their research (which further highlights the IFPI's status as an organization *mainly* dedicated to the Music Community), while also recognizing the existence of an organized "music industry"...*"a massive engine worth more than US\$130 billion globally"*(Pg.3).<sup>12</sup>

Another one of the Letters was filed by a negligible entity<sup>13</sup> that verified **in writing and via telephone conversations that it was guided by Donuts to file a letter of opposition under the Donuts' template letter.**

<sup>7</sup> For example, the opposition letter from a civil rights organization was first made public in the PDF link (<http://www.donuts.domains/images/pdfs/music-CPE-comment-Aug2015.pdf> , Exhibit F) provided by Donuts in the public comment that Donuts submitted on August 12<sup>th</sup>, 2015 PST (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12813>). Both letters were signed on August 12<sup>th</sup>, 2015 so it is clear this was a coordinated effort in light of the fact that ICANN publicly posted both letters on the correspondence page days later on August 18<sup>th</sup>, 2015 (<https://icann.org/resources/pages/correspondence-2012-09-24-en>).

<sup>8</sup> <http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, P.22

<sup>9</sup> ICANN CPE Guidelines, Pg. 22

<sup>10</sup> <https://www.icann.org/en/system/files/correspondence/hammock-to-crocker-et-al-12aug15-en.pdf>

<sup>11</sup> <http://branding.rightside.co/api/download/28qb-dj9ehrud>

<sup>12</sup> <http://branding.rightside.co/api/download/28qj-3k4nlku8>

<sup>13</sup> For example, the entity's official website is a parked page on Godaddy, (See <http://www.asymusicians.org>, retrieved on November 3<sup>rd</sup>, 2015).



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The subject letter reveals profound inconsistencies. For example, on one hand the entity claims to be an “organization...comprised of musicians...in the music community” while on the other hand blatantly shuns the existence of the music community calling the music community a “thing” by using the Donuts templated language rational statement: “music community, if such a thing even exists.”

Such revealing statements by both Rightside and Donuts’ allies highlight that any opposition letters that doubt or shun the existence of the community are spurious, unsubstantiated, not of reasoned nature and filed for the purpose of obstruction.

4) None of the objectors (except Donuts<sup>14</sup>) opposed the other .MUSIC community applicant called Far Further, even though Far Further had eligibility policies that excluded a majority of the music community.<sup>15</sup> By the same token, none of these opposing parties filed opposition comments against Amazon’s exclusive-access applications for .MUSIC, .SONG and .TUNES.

Surely, if any of the opposing entities had any genuine concerns about “unfairly preventing access to domain names by those with legitimate musical interests” and/or “exclusive access,” then they would have opposed both Amazon’s and Far Further’s applications as well. None did, which leads to the reasonable conclusion that DotMusic was targeted and opposition was filed for the purpose of obstruction.

#### 5) Opposition Letters are Unsubstantiated and Misinformed

In contrast to Far Further’s application (that went unopposed) and the unsubstantiated claims made by the opposing parties, DotMusic’s application states that all entities with legitimate music interest have access to .MUSIC domains.

In terms of Eligibility, the DotMusic application provides in pertinent part that registrants will be:

*“taken from holistic perspective with due regard of Community particularities” ...without discrimination, conflict of interest or ‘likelihood of material detriment to the rights and legitimate interests’ of the Community.”* (Application Answer to Question 20A)

Furthermore, DotMusic’s application states that all types of music constituents are eligible:

*“The Music Community encompasses global reaching commercial and non-commercial stakeholders, and amateur stakeholders.”* (Application Answer to Question 20A)

<sup>14</sup> Donuts has followed an ongoing pattern of spurious, ant-competitive behavior of filing opposition letters to every community applicant they were competing against. In the case of DotMusic, Donuts used the same template opposition letter that was previously used to file against both the .CPA community applicants. In its conclusion of its opposition letter to DotMusic, Donuts forgot to replace CPA with MUSIC (emphasis added) (See <https://www.icann.org/en/system/files/correspondence/moody-to-crocker-et-al-12aug15-en.pdf>, Pg. 23)

<sup>15</sup> <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>



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There were also some unsubstantiated comments by Donuts and a “civil liberties organization” that DotMusic’s application:

*“claims community status as a monopoly” and*

*“overwhelmingly favor[s] entrenched industry organizations and interests while marginalizing innovators and the substantially larger number of individual “members” that the applicant claims to represent in name but does not in fact.”<sup>16</sup>*

Such comments are unsubstantiated. DotMusic’s application clearly states that its Mission and Purpose will be:

*Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional advisory board working in the best interests of the Music Community. (Application Answer to Questions 18 and 20)*

A quick glance at DotMusic’s multi-stakeholder expanding governance board<sup>17</sup> reveals that it includes all types of stakeholders, representing both commercial and non-commercial interests.

This is further clarified in DotMusic’s Public Interest Commitments:<sup>18</sup>

*“A commitment to not discriminate against any legitimate members of the global music community...This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes.” (Enumerated Commitment #3)*

*“A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents.” (Enumerated Commitment #5)*

Furthermore, the Letters claim that:

*“DotMusic Limited claims in its application to represent the interests of the entire global community.”*

Such comments are misleading and misinformed because DotMusic refers to the .MUSIC string representing the entire Community:

<sup>16</sup> <https://www.icann.org/en/system/files/correspondence/moody-to-crocker-et-al-12aug15-en.pdf>, Exhibit F

<sup>17</sup> <http://music.us/board>

<sup>18</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>



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*“The MUSIC string relates to the Community by completely representing the entire Community”*  
 (Application Answer to Question 20D)

Furthermore, according to the ICANN’s CPE Guidelines, a community application may score maximum points for support if, either:

*“multiple organizations support the application, with documented support from organizations representing a majority of the overall community addressed,”* or

*“the applicant ha[s] support from the majority of the recognized community member organizations.”<sup>19</sup>*

DotMusic has support from the organizations representing a majority of the community defined and has the support from the majority of the recognized community member organizations, including organizations mainly dedicated to the community, such as the IFPI.

6) Some Opposition Comments are Time-Barred and Oppose the AGB and 2007 GNSO Final Report.

Opposition comments by Donuts and a “civil liberties organization” attack the ICANN AGB and the CPE process, calling community applications (as envisaged by the ICANN AGB and the 2007 GNSO Final Report for the Introduction of New Generic Top-Level Domains<sup>20</sup>) as “beauty contests” that “restrict legitimate uses” and “stifle free expression:”

*“As a result, gTLD community applications have devolved into “beauty contests” that end up restricting numerous lawful and legitimate uses of domain names, stifling the free expression.”<sup>21 22</sup>*

As stated recently by ICANN in response to Donuts’ Independent Review Process (IRP) claims:

*“When an applicant submits a community-based application, it is not, as the Claimants imply, simply seeking to “exploit the application process” (IRP Request ¶ 47). As set forth in the Guidebook, community-based applicants agree to operate the applied-for gTLD “for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1, Cls. Ex. RM-5). This*

<sup>19</sup> CPE Guidelines, Pg. 18

<sup>20</sup> 2007 GNSO Final Report for the Introduction of New Generic Top-Level Domains, “where an applicant lays any claim that the TLD is intended to support a particular community, that claim will be taken on trust (CV 7 -10)” and a “community should be interpreted broadly and will include, for example, an economic sector, a cultural community” (IG P\*), See <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

<sup>21</sup> <https://www.icann.org/en/system/files/correspondence/moody-to-crocker-et-al-12aug15-en.pdf>, Exhibit F

<sup>22</sup> Both Donuts and the “civil rights organizations” did not oppose the .FOOD exclusive-access application (<https://mm.icann.org/pipermail/spec13-request/2015-October/date.html>). Similarly they did not oppose the .LAW application ([http://circleid.com/posts/20151013\\_portfolio\\_update\\_october\\_launches\\_and\\_renewal\\_rates](http://circleid.com/posts/20151013_portfolio_update_october_launches_and_renewal_rates)) or the .BANK application either (<http://thedomains.com/2015/10/23/36-of-all-us-banks-have-purchased-a-bank-domain-name>), which were appropriately are restricted to community members. Such inaction shows the obstructive targeting of DotMusic.



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*involves implementing “dedicated registration and use policies for registrants in [the applied-for gTLD],” (Guidebook § 1.2.3.1, Cls. Ex. RM-5) policies that substantially restrict the sorts of domain name registrations a gTLD may accept and thereby might significantly limit the potential profitability of a gTLD. (Pg.6)...The recommendation of the GNSO that applications representing communities be awarded priority in string contention (ICANN Board Rationales for the Approval of the Launch of the New gTLD Program at 94 (“ICANN Board Rationales”) (Cls. Ex. RM-11)).<sup>23</sup>*

*As detailed in the Board’s Rationales for the Approval of the Launch of the New gTLD Program, issued in June 2011, the application evaluation procedures, including the CPE procedure (and the decision to grant successful community-based applications priority in cases of string contention), were adopted by the ICANN Board after years of extensive policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal counsel, numerous ICANN communities, Internet stakeholders, and community members from around the world, all in compliance with ICANN’s Articles and Bylaws (ICANN Board Rationales at 93-105 (Cls. Ex. RM-11)).<sup>24</sup>*

*Despite having ample opportunity to do so, Claimants did not challenge the CPE process at the time the Guidebook was implemented. If Claimants, or anyone else for that matter, had concerns related to these issues, they were properly pursued at the time, and not years later.*<sup>25</sup> (emphasis added)

#### 7) No Reputable Organization of Non-Negligible Size Relevant to Music Filed an Opposition Letter

According to the ICANN’s CPE Guidelines, “consideration of opposition is not based merely on the number of comments or expressions of opposition received.” Opposition is only relevant if there is opposition from an organization that is both clearly associated with the string and considered “non-negligible.” None of the Letters were submitted by a “reputable organization”<sup>26</sup> that is associated with the string or an organization that is “non-negligible”<sup>27</sup> in size. As suggested by the CPE Guidelines, a “web search” of all the entities that submitted the Letters and the string “music” can substantiate that all the entities are “negligible” in size. Furthermore, most of the Letters were submitted by individuals using the orchestrated and templated opposition comments. Other Letters were submitted by organizations that do not have a mission, membership or activities that are clearly music-related e.g. one of the entities is a “civil liberties organization,” another is a “school” with a mission to “prepare students to face challenges as confident, principled global citizens,”

<sup>23</sup> <https://www.icann.org/en/system/files/files/icann-response-birch-mmx-irp-request-redacted-27apr15-en.pdf>, Pg.10

<sup>24</sup> Ibid, Pg. 16 and Pg. 17

<sup>25</sup> Ibid, Pg. 18

<sup>26</sup> According to Merriam Webster dictionary, “reputable” is defined as “respected and trusted by most people.” See <http://www.merriam-webster.com/dictionary/reputable>. None of the opposition submitted was generally-known to be respected and trusted by most people i.e. by a majority of people.

<sup>27</sup> According to Oxford Dictionaries, the definition of “negligible” is “insignificant.” Synonyms include: “minor”, “inconsequential,” and “minimal,” See [http://www.oxforddictionaries.com/us/definition/american\\_english/negligible](http://www.oxforddictionaries.com/us/definition/american_english/negligible). None of the opposition submitted was generally-known to be significant, major or consequential (i.e. non-negligible) especially when the level of support is taken in context and comparatively (DotMusic’s community application is supported by organizations with members that represent over 95% of global music consumed).



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and another is a “State Legislator” from a district with ties to a competitor entity. None of the purported opposers are legitimate, non-negligible organizations with a mission, membership or activities that are clearly associated with “music.”

#### Conclusion

According to ICANN’s CPE Guidelines:

*To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.*<sup>28</sup>

Accordingly, for the aforementioned reasons it is respectfully submitted that to the extent the EIU is considering the Letters as opposition, it should be found that the Letters are not relevant and also filed for obstruction and anti-competitive purposes.

Applicant looks forward to being evaluated on the merits of its Application.

Respectfully submitted,

//Jason Schaeffer//

As Counsel on behalf of DotMusic Limited

Cc: Constantine Roussos, Founder

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<sup>28</sup> ICANN CPE Guidelines, <http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, Pg. 20