

IP JUSTICE

IP Justice is an International Civil Liberties Organization that Promotes Internet Freedom, Innovation Policy, and Balanced Intellectual Property Rights.

www.ipjustice.org

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To: Dr. Steve Crocker, Chairman of the ICANN Board
Steve.crocker@icann.org
Fadi Chehadé, ICANN President and CEO
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newgtlds@icann.org

Re: Opposition to .MUSIC “Community” Application Based on Freedom of Expression and Innovation Policy Concerns

Dear ICANN:

I write as Executive Director of IP Justice to express our opposition to the so-called “community” application by DotMusic Limited, <http://music.us/> (“Music.US”), for the .MUSIC new gTLD string, Application ID 1-1115-14110 (the “Application”).

Founded in 2002 as a California non-profit public benefit corporation, IP Justice is an international civil liberties organization that promotes Internet freedom, innovation policy, and balanced intellectual property rights. IP Justice participates in various international law and Internet policy arenas, which, in addition to ICANN, include the World Intellectual Property Organization (WIPO) and the Internet Governance Forum (IGF) of the United Nations (UN); IP Justice has been as an accredited consultant with the UN’s Economic and Social Council (ECOSOC) since 2003.

IP Justice represents members from all corners of the globe and from a diversity of interests, all seeking laws and policies that promote online freedom. Our members include intellectual property attorneys such as myself who have actively represented clients in transactional and litigation matters involving music, publishing, and other subjects of copyright. To the extent Music.US claims to represent intellectual property interests and music attorneys, I can certainly say that is not the case with respect to those of us in IP Justice and similar digital rights organizations, which share our values regarding lawful public access to protectable expression for which creators should and deserve to be compensated. Indeed, it appears that the Music.US application as drafted would discriminate against organizations such as ours that would have a legitimate interest in registering .MUSIC domain names but may not qualify to do so until, if at all, after a “sunrise” period and two “land rush” layers during which apparently preferred interests have earlier opportunities to do so.

ICANN’s “community” designation has been used in practice principally by applicants seeking to assert exclusive rights over discussion subjects and means of expression that appeal to a broader public, to whom the so-called “community” applicant would effectively deny or artificially limit access to expression. “Communities” as conceived by applicants

overwhelmingly tend to favor 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. 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 that ICANN claims to promote in its Bylaws and its new gTLD program rules.

The concerns that free speech organizations like IP Justice have with the “community” TLD concept are exemplified clearly by the so-called community application for .MUSIC. Aside from undermining an inclusive model of free competition and free expression, Music.US claims “community” status as a monopoly that ignores a simple reality: that “music” impacts everyone, not merely the large industry associations and groups alleged to comprise the community.

Indeed, it is my understanding that Music.US has sought to eliminate every other applicant competing for the .MUSIC gTLD by interposing every objection conceivably available to it under the new gTLD Applicant Guidebook. It succeeded on none, largely for the reasons that IP Justice opposes granting it community priority. As one panel aptly put it:

Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make all mankind into a “music community” – the word will not stretch that far. There is no public recognition of such a thing as the “music community.” There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

Case No. EXP/467/ICANN/84, Expt. Determination ¶ 27. Despite straining to understand, the expert panel was “not at all clear what [Objector] says the music community is.” *Id.* ¶ 28. Absent discerning a clear delineation of the community, the panel found instead that “[t]he supposed community is formless – there are no boundaries, formal or informal for it” *Id.* ¶ 29.

As a free speech organization, IP Justice agrees that a term as broad and widely touching as “music” does not, and cannot, describe an exclusive “community,” and believes that any attempt to utilize the term in such a fashion stifles competition and chills free expression on the Internet. Control of a string referencing as ubiquitous a concept as “music” ought not be restricted to resourceful industry insiders and their affiliates. Rather, access to that domain must be available to “all mankind” in accordance with the most universal understanding of free speech to which ICANN subscribes. ICANN should not be restricting those who want to use the word music in such an overbroad and arbitrary manner as proposed in the Application.

ICANN’s decisions and actions are required to be guided by the organization’s “mission and core values” as described in ICANN’s corporate bylaws. Specifically, Bylaws Article I, Section 2 includes the “core values” of respecting the creativity, innovation, and flow of information made possible by the Internet; depending on market mechanisms to promote and sustain a competitive environment; and introducing and promoting competition in the

registration of domain names.¹ Awarding the .music TLD to Music.US to restrict the use of the word to such an exclusive and arbitrary category of people who enjoy music would be contrary to ICANN’s core values of promoting competition and the free flow of information. The chilling effects on both individual free expression and on competition in the domain name industry from the Application are factors that the organization is legally bound to consider.

The 2008 “New GTLD Policy Principles and Recommendations” approved by both the GNSO and ICANN’s Board provided explicit protection for freedom of expression rights in Principle G, and Policy Recommendations 3 and 6 for the new GTLD program.² The

¹ ICANN Corporate Bylaws, Article I:
Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

² ICANN New GTLD Principles and Recommendations (approved 2008):

- New GTLD Policy Principle G:
“The string evaluation process must not infringe the applicant’s freedom of expression rights that are protected under internationally recognized principles of law.”
- New GTLD Policy Recommendation 3:
“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law... Examples of these legal rights include ... the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (*in particular freedom of expression rights*).”

Application, however, would excessively chill expression about music, something that touches every human heart and all have a right to discuss equally.

Moreover, the Application fails to demonstrate its own asserted justification for artificially limiting access to a .MUSIC domain – ostensibly, the protection of intellectual property rights. Music.US appears to propose WHOIS data verification and use, anti-abuse and dispute resolution policies that other .MUSIC applicants likewise offer. Purporting to restrict domain-name access to those establishing their music “community” affiliation, particularly given the breadth with which Music.US describes the alleged community, offers no guarantee against piracy. Rather, it hinders those with legitimate interests in music from accessing the .MUSIC domain as Music.US would operate it. Ultimately, a .MUSIC or any other domain must rely on the same types of reporting, take-down, dispute resolution and other enforcement mechanisms that Music.US non-uniquely identifies in its Application.

For the many important foregoing reasons, and in particular, to promote free expression and open competition in the domain name industry, IP Justice strongly opposes granting the Application any “community” priority.

Respectfully submitted,

Robin Gross
IP Justice Executive Director

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- New GTLD Policy Recommendation 6:
“Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.” Recommendation 6 goes on to cite as examples of these legal norms, rights provided by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, both of which guarantee freedom of expression in any media and regardless of frontiers.