ANNEX 1

Expert Determinations for .music, .song and .tunes

EXP_461_ICANN_78 (c EXP_479_ICANN_96 EXP_480_ICANN_97)

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/461/ICANN/78

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

AMAZON EU S.À R.L.

(LUXEMBOURG)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL CENTRE FOR EXPERTISE

CASE NUMBER

EXP/461/ICANN/78
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

OBJECTION TO .MUSIC (DOTMUSIC)

CONCERNING APPLICATION ID 1-1316-18029

CONSOLIDATED WITH CASES EXP/479/ICANN/96 AND EXP/480/ICANN/97
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG) and
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

EXPERT DETERMINATION

By

PROFESSOR FRANCISCO ORREGO VICUÑA

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ABBREVIATIONS

"Applicant" is an entity that has applied to ICANN for a new gTLD.

"Application" is the submission to ICANN of a request for registration of a new gTLD.

"Community Objection" is the objection to an Application on the basis of substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

"DNS" is the Domain Name System.

"DRSP Rules" are the Rules for Expertise of the International Chamber of Commerce applicable to a "Community Objection".

"Expert" is a member of a panel constituted with one expert.

"Expert Determination" is the decision on the merits of an Objection rendered by a panel under the applicable DRSP Rules.

"Respondent" is the Applicant responding to the Objection.

"Objection" is the filing in ICANN opposing registration of a new gTLD for which an Application has been submitted.

"Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an Application has been submitted.

"Panel" is the panel of Experts constituted by the Dispute Resolution Service Provider.

"gTLD" is a New Generic Top-Level Domain.

"GAC" is the ICANN Government Advisory Committee.

"ICANN" is the Internet Corporation for Assigned Names and Numbers.

"ICC" is the International Chamber of Commerce.

"IFACCA" is the International Federation of Arts Councils and Culture Agencies.

"Procedure" is the New gTLD Dispute Resolution Procedure, attachment to Module 3 of the gTLD Applicant Guidebook.

"TLD" is a Top-Level Domain.

EXPERT DETERMINATION

IN THE CASE

EXP/461/ICANN/78

(CONSOLIDATED WITH CASES EXP/479/ICANN/96 AND EXP/480/ICANN/97)

OBJECTION TO THE APPLICATION IN RESPECT OF THE TOP LEVEL DOMAIN NAME .MUSIC (DOT MUSIC) (APPLICATION ID 1-1316-18029)

I. INTRODUCTION

1. This Expert Determination is adopted in the above-referenced case under the New Generic Top-Level Domain (gTLD) Names Dispute Resolution Procedure of the Internet Corporation for Assigned Names and Numbers (ICANN), administered by the International Centre for Expertise of the International Chamber of Commerce (ICC).

A. THE OBJECTOR

2. The Objector in this case is:

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

Mr. Rich Bengloff

Contact Information Redacted

Telephone: Contact n ormation Redacted

Email: Contact nformation Redacted

The Objector is represented by:

DOTMUSIC

Mr. Constantinos Roussos
Contact Information Redacted

Telephone: Contact Information Redacted
Email: Contact Information Redacted

and

ESQWIRE.COM, P.C.

Mr. Jason B. Schaeffer
Contact Information Redacted

Telephone: Contact Information Redacted
Email: Contact Information Redacted

B. THE APPLICANT

3. The Applicant in this case is:

AMAZON EU S.À R.L.

Ms. Lorna Jean Gradden
Contact Information Redacted

Telephone: Contact n ormation Redacted
Email: Contact Information Redacted

The Applicant is represented by:

THE GIGALAW FIRM

Mr. Douglas M. Isenberg
Contact Information Redacted

USA

Telephone: Contact n ormation Redacted

Email: Contact Information Redacted

C. THE EXPERT

4. The appointed Expert in this case is:

Professor Francisco Orrego Vicuña
Contact Information Redacted

Telephone: Contact n ormation Redacted

Email: Contact Information Redacted

II. PROCEDURE

A. GOVERNING RULES

5. This case is governed by the Rules for Expertise of the ICC, supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (Procedure), as well as by the Articles and rules established in the Applicant Guidebook noted.

B. PLACE OF THE PROCEEDINGS

6. The place of the proceedings is, in accordance with Article 4(d) of the Procedure, that of the ICC International Centre for Expertise in Paris, France.

C. NATURE OF THE OBJECTION

7. The Objection is made on the ground of Community Objection in accordance with Article 2 of the Procedure.

D. CONSOLIDATION

8. The ICC International Centre for Expertise informed the parties on 24 April 2013, that Case EXP/461/ICANN/78 was to be consolidated with Cases EXP/479/ICANN/96 and EXP/480/ICANN/97 pursuant to Article 12 of the Procedure. These other cases are the subject of separate Expert Determinations.

E. LANGUAGE

9. All submissions and correspondence in these cases have been made in English in accordance with Article 5(a) of the Procedure.

F. MEANS OF TRANSMISSION

10. In accordance with Article 6(a) of the Procedure all communications concerning this case were transmitted electronically.

G. PROCEDURAL STEPS

11. The Objection in this case was submitted on 13 March 2013. Applicant's Response was submitted on 16 May 2013.

12. The Expert in this case was appointed by the Chairman of the Standing Committee of the ICC International Centre for Expertise on 12 June 2013. The file was transmitted to the Expert by the ICC International Centre for

Expertise on 16 July 2013. The Expert is the sole member of the Panel in accordance with Article 13 of the Procedure.

13. Following the transmittal of the file the Expert wrote to the Parties on 19 July 2013, so as to begin the organization of the proceedings.

14. On 29 July 2013, the Objector submitted to the ICC International Centre for Expertise a Request for Leave to File Additional Submission in reply to Applicant's Response to Objection. Upon the instructions of the ICC International Centre for Expertise the Objector referred the Request to the Expert on 30 July 2013.

15. On 30 July 2013, the Expert invited the Applicant to comment on the Objector's Request. The Applicant submitted its comments on 31 July 2013. Further comments on the topic were made by the Objector and by the Applicant on 31 July and 1 August respectively.

16. On 2 August 2013 the Expert decided that this Request was denied, stating to this effect the following:

> "Having examined the file and the information and arguments submitted by the Objector and the Applicant, the Expert is of the opinion that it contains all the necessary elements required to reach a Determination on this dispute. Accordingly the Expert considers that there is no need to invite additional submissions as envisaged under Article 17 (a) of the Procedural Rules governing these proceedings.
>
> The Expert further notes the Applicant's comment to the effect that under Article 18 of the Procedural Rules production of documents is limited to exceptional cases. No such exceptional case exists at this time.
>
> On the basis of these considerations the Request is denied and its contents are not to be included in the file of this case. This is without prejudice to the possibility that if the Expert finds there is a need for further information as is prepares its Determination, it may invite the parties to provide this information as envisaged under Article 18."

17. No hearings were held in this case.

18. The Expert´s Determination was transmitted to the ICC International Centre for Expertise on 22 August 2013 within the 45 day period envisaged in Article 21(a) of the Procedure.

19. On 10 October 2013 the Objector submitted a further Request for the Expert to consider some additional material that became available on the Applicant's Application. The Applicant replied to this Request on 11 October 2010. On this last date the Expert did not accept this Request in view that the draft Determination had already been submitted to the ICC International Centre for Expertise. Additional comments from the Objector were received following this ruling by the Expert.

III. OBJECTOR'S STANDING TO FILE A COMMUNITY OBJECTION

20. Article 3.2.2.4 of the Guidebook identifies the requirements for filing a Community Objection. These requirements refer to the need for the Objector to be an established institution which has an ongoing relationship with a clearly delineated community, indicating the two main criteria that must be proved to the satisfaction of the Expert.

21. The Parties have different views about whether these requirements have been met as will be summarized below.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

22. The Objector in this case firstly notes the importance of the Independent Music Sector since the beginning of the recording industry and identifies the American Association of Independent Music (A2IM) with such community, on whose behalf it objects to the Application here considered. The community is described as a broad coalition of music labels comprising over 32.6% of the United States music industry market share.

23. As the independent music sector represents the largest market share of commercial music, including 90% of music released, the Objector asserts that it represents a significant portion of that community. Member labels of A2IM represent a clearly delineated community. It notes the non-profit trade nature of this organization. In turn the Objector maintains that the Associate members of A2IM represent a significant portion of the global music community.

24. It is also argued that A2IM represents a significant portion of the music community making up the World Independent Network (WIN), to which it provides advocacy and representation services, commerce opportunities and other services, thus providing a central, positive voice for independent music companies. Among the many objectives listed for A2IM, fair trade, technology and distribution and media access are noted.

25. The clearly delineated community of substantial size that A2IM represents, it explains, includes the United States Independent label music community, WIN, the Association of Independent Music, the Independent Music Companies Association (IMPALA) and Medlin Network. Collectively, all such associations constitute a significant portion of the music community to which the string is explicitly or implicitly targeted. All such entities substantially oppose the Application.

26. The Application which is objected to creates, in the Objector's view, material economic detriment to millions of independent music entities as it would prevent registering domains under popular music-themed strings, such as .Music. It also asserts that the improved access to music consumers and independent music businesses is critical for efficient music distribution. This would inevitably result in strengthening the position of the Applicant as the second largest online music retailer, while such Applicant would take 30% in "middle-man" fees as opposed to the 100% of sales independents would receive if they were allowed to compete under a verified community-based music-themed string.

27. The Objector further maintains that Amazon has a history of market power abuse resulting in detrimental mass copyright infringement, noting its large advertising in Google ad-funded pirate networks.

B. THE APPLICANT'S POSITION AND ARGUMENTS

28. The Applicant in its Response maintains that the Objector lacks standing to file the Objection as it has failed to prove that it is an established institution associated with a clearly delineated community as mandated under Article 3.2.2.4 of the Guidebook. The Applicant considers that the community the Objector purports to represent is excessively large, diverse and complex and thus it is not clearly delineated. In the best of cases the Objector could represent one segment of a portion of the music community, such as the "American" component indicated in the Objector's name.

29. Neither does the Objector qualify as an established institution in the Applicant's view, lacking adequate global recognition, lacking evidence as to the length of time it has been in existence, except for a reference in passing about a seven-year existence, and also lacking public historical evidence of its existence such as a formal charter or national or international registration, or validation by means of a government, inter-governmental organization or treaty. Neither does the Objector offer evidence about qualifying as a not-for-profit trade organization.

30. The Applicant asserts further that the Objector has not proved its ongoing relationship with the clearly delineated community envisaged, such as the presence of mechanisms for participation, requirements of membership and specific activities undertaken on a regular basis for the benefit of members. The lack of evidence concerning the institutional purpose related to the benefit of the associated community is also discussed by the Applicant, since the Objector indicated only very general goals such as promoting sector opportunity or improving business conditions. Neither is there any level of formal boundaries of the community identified. According to the Applicant,

the Objector's stated information is too vague and general to meet any of these requirements.

C. THE EXPERT'S FINDINGS

31. The Expert must first determine whether the Objector is an institution and meets the standing requirement of Article 3.2.2.4 of the Guidebook in respect of Community Objections. The Expert finds that the Objector is indeed a legally established institution although this requirement must also be examined in the light of the factors listed in that Article so as to determine whether such institution meets the substantive requirements of its standing as an Objector for the purpose of this procedure. Such factors include but are not limited to the level of global recognition of the Objector, the length of time of its existence and the public historic evidence of such existence, with reference to some specific examples.

32. The level of global recognition of the Objector is in the Expert's view very limited. While there is reference to some associations of an international scope this does not mean that it is the Objector that has qualified as a globally recognized institution. In fact, as the Applicant has noted, the Objector would be rather related to the "American" music industry and not to a global level of recognition.

33. The letters the Objector has submitted in support of its Objection in Appendix H thereto are in essence produced by its current or former board members, all written in mostly identical terms, thus falling short of the requirement of global recognition (See for example letters from Alligator, 19 February 2013; Beggars Group US, 21 February 2013; BMLG, 9 February 2013). Most of such letters originate in United States based companies, with only a few exceptionally originating elsewhere, mainly in Australia, Belgium, Germany, Canada and South Africa, and still fewer having some regional or international scope. In the context of a global market with a significant number of participants from many continents and countries, the requirement of a global recognition calls for expressions of support of many

organizations or institutions constituting the community, a standard not met in the case of the Objection considered.

34. The Objector has also supplied in Appendix H to the Objection a long list of members of the International Federation of Arts Councils and Culture Agencies (IFACCA), comprising many governmental institutions around the world, but with the indication that while dotMusic has been given "in-principle approval by the board of IFACCA, it has not been endorsed by individual member organizations" (.MUSIC (DOTMUSIC) Supporting Music Community Organizations, first list under Appendix H, second paragraph). In this context it becomes quite clear that governmental institutions have not considered any form of participation in respect of this Objection. A still longer list and description of the members of the International Association of Music Information Centres is supplied, also in Appendix H, but the Objector only refers in respect of some of them to the prospective activity of working with such institutions. No specific agreements or activities are listed. These listings are comprehensive but offer no specific relationship with the Objector so that their probative value is null.

35. The letters and other material produced in support of the Objection evidence that while there are a number of institutions concerned with the gTLD registration in this ambit, this concern, legitimate as it might be, does not alter the fact that no specific community can be identified and hence the representative character of the Objector is more speculative than real. The letters have been considered by the Expert but they cannot justify a conclusion different from what is here noted.

36. The Applicant has also noted that as to the requirement to provide evidence of the time the Objector has been in existence, the Objection only indicates its existence for seven years. In the Expert's view this is enough to meet this particular criterion of the Guidebook as the main concern of the governing rules is to ensure that the Objector will not have been established solely in conjunction with the gTLD application process.

37. The public historical evidence of its existence is also weak but the Expert is mindful that the factors listed in Article 3.2.2.4 of Module 3 of the ICANN Guidebook are mere indications and not an exhaustive list.

38. The Expert thus concludes in respect of the factors listed in respect of the requirement of the Objector being an established institution under Article 3.2.2.4 of the Guidebook that the Objector has proven its existence during a period of time sufficient to give it the standing to file an Objection. The factors relating to global recognition or the public historical evidence about its existence also indicated in that Article have not, however, been adequately met. The Panel turns now to the examination of other requirements under the Article in question which might shed light on the Objector's standing.

39. The second main requirement under Article 3.2.2.4 of the Guidebook is that the Objector must have an ongoing relationship with a clearly delineated community. The factors to be considered to this end are also clearly provided by that Article, notably the presence of mechanisms for participation, institutional purposes for the benefit of the community, performance of regular activities to this end and the level of formal boundaries of the community. Again here the evidence offered by the Objector in respect of this requirement is weak in several aspects. The Objector in his Objection is only listing mechanisms for participation in activities, membership and leadership which are mostly related to very general institutional goals; however, the Objector does not offer specific criteria or examples of such participation. The same is true of the institutional purpose related to the benefit of the associated community. How such purported benefits are to be achieved remains largely unexplained.

40. The very existence of a clearly delineated community is doubtful as any meaningful formal boundaries will be too broad and difficult to identify. The Expert is called to perform a balancing of the various factors discussed and other relevant information, and the Objector is not expected to satisfactorily meet every such factor in order to attain adequate standing to file an

Objection. Indeed, Article 3.2.2.4 of the Guidebook provides *in fine*: "The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements". In spite of the best efforts to attain such a balanced consideration the fact remains that the nature of the community in question does lend itself to serious doubts. The Expert thus concludes that the Objector's standing also fails in connection with the various factors that must be considered in the light of an ongoing relationship with a clear delineated community.

41. The Objector's argument has not clearly differentiated the question of its standing from the discussion of the merits of the Objection. While there is some connection between the two sets of conditions, particularly as both Articles 3.2.2.4 and 3.5.4 of the Guidebook refer to a clearly delineated community, the first on standing and the second on the merits, the essence of the respective requirements is different. Aside the fact that the latter Article embodies a number of other requirements that must be met in their totality, the threshold in connection to the specific factor of a clearly delineated community appears to be less demanding in respect of standing than in respect of the merits, as this last one requires in particular a "strong" association between the community invoked and the gTLD string objected to. Notwithstanding these differences the Expert will consider also the various standards governing the merits of the Objection before reaching a final determination on the arguments put forth by the Objector in support of its Objection.

IV. THE SUBSTANTIVE STANDARDS GOVERNING THE MERITS OF THE OBJECTION

42. Article 3.5.4 of the Guidebook sets out the standards applicable to a Community Objection. This Article provides as follows in its opening paragraph:

"The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

• The community invoked by the objector is a clearly delineated community; and

• Community opposition to the application is substantial; and

• There is a strong association between the community invoked and the applied-for gTLD string; and

• The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below".

43. The Parties have expressed again differing views about the meaning of these standards and about whether the Objector meets the requirements set out under the Article noted. The respective positions will be summarized next.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

44. The Objection emphasizes the fourth test quoted above, namely the likelihood of material damage posed by the Application. The Objector's position on the other three tests is largely subsumed under the considerations made in connection with standing discussed above.

45. The Objection asserts that the Application creates a likelihood of material detriment to the rights and interests of a significant portion of the music community to which the string is targeted as competition will be affected by Amazon's market power in ecommerce and its inter-related monopoly. Amazon is described as being by far the largest internet retailer with online sales surpassing US$ 48 billion. Amazon and Apple have established a duopoly amounting to 80% of the online music retail market.

46. The size, diversity and significance of "music" is reflected in the fact that this keyword is the most searched internet category with 226 million monthly Google searches, to which other music-related keywords should be added to reach billions of searches. Amazon's music-themed string would be granted a powerful domain monopoly that would include many related keywords. The Objector refers in this context to the Application's statement admitting a monopoly position in ecommerce. Artists and musicians would be unable to register a .Music domain to legally compete with Amazon on the Internet. The business goals of Amazon would result in a closely managed TLD by registering domains through a single registrar that would prevent the activities of re-sellers in .Music and the existence of a market in .Music domains.

47. The Objection maintains that the Application thus completely and diametrically contradicts ICANN's objectives to increase competition and other ICANN Core Values, such as seeking informed participation. In the Objector's view the Applications made for .Song and .Tunes only make the situation worse. Objections to these other Applications will be as noted decided under separate Expert's Determinations.

48. The absence of a market place will create a definite likelihood of material harm to the legitimate interests of the music community, compounded by the fact that Amazon is the second largest advertiser in Google ad-funded pirate networks. The annual harm caused by piracy has been estimated at US$ 12.5 billion. Amazon's long history of anti-competitive behavior would thus be further enhanced. The Objection notes in particular the fact that Amazon received an ICANN Government Advisory Committee (GAC) Early Warning for all its string applications based on competition grounds as it would exclude other entities and potential competitors from using the TLD. All such consequences would result in breach of both United States and European Union anti-trust legislation and regulations.

B. THE APPLICANT'S POSITION AND ARGUMENTS

49. The Applicant asserts that the Objector has failed to meet the four tests envisaged under Article 3.5.4 of the Guidebook.

50. The Objector first omits providing any evidence about the level of public recognition of the group as a community at a local and/or global levels, a requirement which as noted is intertwined with that concerning standing. It is thus not possible to ascertain the level of public recognition of such purported community. The same holds true for the requirements concerning the formal boundaries of the community, the length of time it has been in existence, the global distribution of the community and the number of people or entities that belong to such community.

51. The Applicant maintains next that the Objector has not proven substantial opposition to the Application within the community it purports to represent. The letters attached as Appendix H of the Objection do not show whether they represent a sizable proportion of the relevant community, nor do they explain how many members does the Objector have and its comparison with the relative composition of the community.

52. It follows that it is not possible to ascertain either the representative nature of the entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among the sources expressing opposition, the historical defense of the community in other contexts or the costs incurred in expressing opposition by means of other channels. The Applicant notes that during the three-month period during which the public was invited to submit comments on gTLD applications no comments were received from the Objector opposing the .Music Application.

53. The Applicant also maintains that the Objector has failed to meet the third test of the applicable standards as no proof is provided about a strong association between the string applied for and the community allegedly represented by the Objector. In fact, there is no reference in the Application

to "independent music" nor does the Objector invoke any other public statement by the Applicant reflecting a strong association with such community. Similarly no evidence of the public having associated the Application to a targeting of the community in question has been provided by the Objector, a factor, among other, also listed in Article 3.5.4 of the Guidebook as a test of whether the Objection can prevail on the merits.

54. The Applicant emphasizes that the mission of the .Music registry is to create a dedicated platform for Amazon which would provide additional controls of the technical architecture of this domain, offering a stable and secure foundation for online communication, as it would also provide a platform for innovation and the protection of intellectual property rights, none of which relate to the existence of a strong association between the string in question and the community the Objector claims to represent.

55. The fourth and last test under the Article 3.5.4 of the Guidebook is that concerning the likelihood of material detriment arising from the Application. The Applicant asserts in this respect that the Objector has failed to address or provide evidence about any of the six factors listed under the Article, namely the nature and extent of the damage to the reputation of the community, that the Applicant does not intend to act in accordance with the interests of the community, interference with the core activities of the community, dependence of the community on the Domain Name System (DNS) for its core activities, nature and extent of concrete or economic damage to the community, and level of certainty that detrimental outcomes would occur.

56. The Applicant asserts that the Objector's views that the Application will thwart competition are unsupported and ignore many comments submitted to ICANN to the contrary by a number of relevant institutions collected in Annex 14 of the Response. These comments include those submitted by institutions, scholars and ICANN's At-Large Advisory Committee to the effect that TLDs would foster innovation, result in strong benefits, facilitate online innovation and foster competition.

57. The Applicant further explains that accusations about market power abuse, pirate networks, anti-competitive behavior, exclusive access and other such statements are irrelevant, inaccurate or misleading. Registration of .Music domains by the Applicant and related second level registrations would not result in any anti-competitive effects as experience with other kinds of registration shows. Moreover, similar domain names, such as "music.com", have been registered by entities other than the Objector apparently without creating any illegal monopoly or causing any harm to the Objector.

C.THE EXPERT'S FINDINGS

58. The Expert must first determine in respect of the merits of the Objection whether there is in existence a clearly delineated community, which is the first factor listed in Article 3.5.4 of the Guidebook. The conclusion on this point is not different from what was already indicated in paragraphs 32 – 35 and 39 – 40 above since there is a broad coalition of music labels without formal delineation as a community. The Expert is mindful in this respect of the comments made by Professor Alain Pellet as the Independent Objector established for the dispute resolution process under ICANN, which have been introduced in the record by the Applicant as pertinent to this Objection. Under Article 3.2.5 of the Guidebook the Independent Objector does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

59. The Independent Objector has concluded that after reviewing all applications made to ICANN "it is difficult in these cases to prove the existence of a clearly delineated community" because of the broad scope of a generic term (Allain Pellet: "The Issue of "Closed Generic" gTLDs Applications-The Views of the Independent Objector", 16 May 2013, para. 4, Annex 6 of Applicant's Response to the Objection). The Independent Objector further concludes that in most cases "such a delineated community does not exist" (Ibid. para. 5).

60. This Expert agrees with such comments insofar they are relevant for this particular dispute as in fact the generic nature of the term that identifies a given TLD, such as that with which the Application in this case is concerned, implies by necessity its use by many people and therefore lacks the specificity that would allow for its clear delineation. A broad community may exist at the generic level, as indeed would be the case of "Music" because of the number of entities that will use this term, but this is not conducive to the clear delineation envisaged under this standard.

61. As a consequence of the above, the specific criteria set out under the standard of Article 3.5.4 of the Guidebook for identifying a clearly delineated community are quite difficult to meet. The Applicant convincingly argues that the Objector has failed to produce evidence on any such criteria, with reference to the public recognition of the group as a community, the formal boundaries of the community and persons considered to form a part of it, the length of time about its existence, its global distribution and the number of people or entities composing such community. It is not difficult to realize that this lack of evidence is the result of the community envisaged being too broad.

62. The question of substantial opposition is not different. In point of fact Article 3.5.4 of the Guidebook sets out a number of conditions that must be satisfied by the Objector for the Objection to prevail. Among other factors considered there is the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among sources of expressions of opposition, including regional, subsectors, leadership and membership diversity, the historical defense of the community in other contexts and the costs incurred by objector in expressing opposition.

63. Whether the number of expressions of opposition relative to the composition of the community can be measured in some way is difficult to establish as

the purported community itself is overly broad. With billions of users the expressions of opposition would need to run in high numbers to meet this test. Further, as noted in para. 33 above, the letters accompanying the Objection do not seem to be overly representative of such community and some of the entities expressing opposition do not appear to be very representative either, even within the sectors to which they are associated.

64. The level of recognized stature or weight among sources of opposition as expressed in the letters and material submitted by the Objector is also difficult to compare because the description of such sources and the information supplied is not sufficiently detailed to draw a comparison. It is also quite evident that this situation makes it impossible for the Objector to provide evidence about the defense of the community in other contexts or to provide the description and costs of other channels used to convey opposition.

65. The Expert must turn now to the issue of whether the Application has in some way targeted the Objector's community. Under Article 3.5.4 of the Guidebook the criteria indicated to determine whether targeting has occurred includes statements contained in the application, other public statements by the applicant and associations by the public. On the assumption that such a community exists, the Objector must still prove "a strong association" between the gTLD string applied for and the community which it claims to represent.

66. While an association exists of course between the gTLD applied for and the term "music", this is by definition a generic term that might relate to music in general but not specifically to the "independent music community" the Objector claims to represent. The Applicant has explained that the Application does not refer to such a community at all nor are there other statements indicating a strong association or statements that might have triggered an association by the public of such targeting. The extremely broad definitions of music that the Applicant sets out in Annex 13 of its Response

is enough to realize that none of those definitions lend themselves to establish a strong association with the community in the present case.

67. The last test on which the Expert must reach a determination is that concerning a likelihood of material detriment. The scope of the standard is quite precise on this matter. Two distinct kinds of damage are considered in Article 3.5.4 of the Guidebook, the first being the nature and extent of damage to the reputation of the community, and the second the nature and extent of concrete or economic damage to the community. In either kind of damage the Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. In addition said Article requires evidence that the Applicant does not intend to act in accordance with the interests of the community, that there will be interference with the core activities of the community and dependence of such community on the DNS for its core activities. In the end the level of certainty that detrimental outcomes would occur has to be established.

68. The Objector has not proved the likelihood of either kind of damage occurring as a result of the eventual approval of the Application. The Expert does not consider that it is likely that the reputation of the community could in any way be affected by this Application nor is the reputation of A2IM or any of its members at issue. Whether there would be a likelihood of concrete or economic damage to the community caused by the Application were it to succeed has not been established either. While, as noted in paragraphs 22, 23 and 48 above, the Objector has indicated figures concerning the market participation that could be affected and some general estimate of the amounts potentially involved in damages, this does not appear to be related to the interests of a specific community which the Objector purports to represent but rather refers to the global market in general.

69. In essence the discussion concerns whether competition will be thwarted as the Objector believes, or not affected at all as the Applicant asserts. The Expert is mindful in this respect of the various institutional and scholarly

opinions submitted by the Applicant to the effect that closed domains and unified registration, while entailing some restrictions, result rather in promoting online innovation and reduce the risk of abusive registrations. Opinions to the contrary submitted by the Objector are rather tenuous and do not address specifically some of the main issues underlying this discussion, in particular whether damage of some kind is likely to occur and competition affected as a result.

70. Whether there is market power abuse, support for pirate networks and anti-competitive behavior, as the Objector argues, is not something that can be established beforehand and is thus purely speculative. Should there be any such consequence competition regulators will very well know how to address this problem, certainly in the context of United States and European Union legislation which the Objector invokes. Any affected entity, including the Objector, would be able to request investigations in that event.

71. It is thus not possible to conclude that there is in this case a likelihood of concrete or economic damage to the community or that the Applicant intends to act contrary to the interests of such community or interfere with its activities. The dependence of the community on the DNS for its core activities has not been proven either as many other kinds of registration of second level domain names has not resulted in hampering those activities. In fact the Applicant explains that the use of, for example, "cars.com" has not resulted in any restriction of competition, as neither has the use of "music.com", or "musician.com" (Applicant's Response, p. 14).

72. The Expert is directed to apply the very conclusions made explicit by the standards discussed, which are three in number:

> "If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail" (Article 3.5.4 of the Guidebook, "Community", *in fine*).

"If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail" (Article 3.5.4 of the Guidebook, "Substantial opposition", *in fine*).

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail" (Article 3.5.4 of the Guidebook, "Detriment", *in fine*).

73. The Objection has not satisfied any of these requirements, which under Article 3.5.4 are moreover cumulative. Even if the standing requirements would have been met, which is not the case, the Objection fails on the merits.

74. The Expert has no objection to the publication of this Determination in the ICC's webpage.

V. DECISION

For the above reasons and according to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)'s Objection is dismissed.

2. Applicant AMAZON EU S.À R.L. prevails.

3. AMAZON EU S.À R.L.'s advance payment on costs shall be refunded by the ICC International Centre for Expertise to AMAZON EU S.À R.L.

Date: 6 December 2013

Signature: _____

Professor Francisco Orrego Vicuña

Expert

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/479/ICANN/96

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

AMAZON EU S.À R.L.

(LUXEMBOURG)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL CENTRE FOR EXPERTISE

CASE NUMBER

EXP/479/ICANN/96
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

OBJECTION TO .SONG (DOT SONG)

CONCERNING APPLICATION ID 1-1317-53837

CONSOLIDATED WITH CASES EXP/461/ICANN/78, EXP/480/ICANN/97
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG) and
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

EXPERT DETERMINATION

By

PROFESSOR FRANCISCO ORREGO VICUÑA

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ABBREVIATIONS

"Applicant" is an entity that has applied to ICANN for a new gTLD.

"Application" is the submission to ICANN of a request for registration of a new gTLD.

"Community Objection" is the objection to an Application on the basis of substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

"DNS" is the Domain Name System.

"DRSP Rules" are the Rules for Expertise of the International Chamber of Commerce applicable to a "Community Objection".

"Expert" is a member of a panel constituted with one expert.

"Expert Determination" is the decision on the merits of an Objection rendered by a panel under the applicable DRSP Rules.

"Respondent" is the Applicant responding to the Objection.

"Objection" is the filing in ICANN opposing registration of a new gTLD for which an Application has been submitted.

"Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an Application has been submitted.

"Panel" is the panel of Experts constituted by the Dispute Resolution Service Provider.

"gTLD" is a New Generic Top-Level Domain.

"GAC" is the ICANN Government Advisory Committee.

"ICANN" is the Internet Corporation for Assigned Names and Numbers.

"ICC" is the International Chamber of Commerce.

"IFACCA" is the International Federation of Arts Councils and Culture Agencies.

"Procedure" is the New gTLD Dispute Resolution Procedure, attachment to Module 3 of the gTLD Applicant Guidebook.

"TLD" is a Top-Level Domain.

EXPERT DETERMINATION

IN THE CASE

EXP/479/ICANN/96

(CONSOLIDATED WITH CASES EXP/461/ICANN/78, EXP/480/ICANN/97)

OBJECTION TO THE APPLICATION IN RESPECT OF THE TOP LEVEL DOMAIN NAME .SONG (DOT SONG) (APPLICATION ID 1-1317-53837)

I. INTRODUCTION

1. This Expert Determination is adopted in the above-referenced case under the New Generic Top-Level Domain (gTLD) Names Dispute Resolution Procedure of the Internet Corporation for Assigned Names and Numbers (ICANN), administered by the International Centre for Expertise of the International Chamber of Commerce (ICC).

A. THE OBJECTOR

2. The Objector in this case is:

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

Mr. Rich Bengloff

Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

The Objector is represented by:

DOTMUSIC

Mr. Constantinos Roussos
Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

and

ESQWIRE.COM, P.C.

Mr. Jason B. Schaeffer
Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

B. THE APPLICANT

3. The Applicant in this case is:

AMAZON EU S.À R.L.

Ms. Lorna Jean Gradden
Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

The Applicant is represented by:

THE GIGALAW FIRM

Mr. Douglas M. Isenberg
Contact Information Redacted

USA
Telephone : Contact Information Redacted
Email: Contact Information Redacted

C. THE EXPERT

4. The appointed Expert in this case is:

Professor Francisco Orrego Vicuña
Contact Information Redacted

Telephone: Contact Information Redacted
Email: Contact Information Redacted

II. PROCEDURE

A. GOVERNING RULES

5. This case is governed by the Rules for Expertise of the ICC, supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (Procedure), as well as by the Articles and rules established in the Applicant Guidebook noted.

B. PLACE OF THE PROCEEDINGS

6. The place of the proceedings is, in accordance with Article 4(d) of the Procedure, location of the ICC International Centre for Expertise in Paris, France.

C. NATURE OF THE OBJECTION

7. The Objection is made on the ground of Community Objection in accordance with Article 2 of the Procedure.

D. CONSOLIDATION

8. The ICC International Centre for Expertise informed the parties on 24 April 2013, that case EXP/479/ICANN/96 was to be consolidated with cases EXP/461/ICANN/78 and EXP/480/ICANN/97 pursuant to Article 12 of the Procedure. These other cases are the subject of separate Expert Determinations.

E. LANGUAGE

9. All submissions and correspondence in these cases have been made in English in accordance with Article 5(a) of the Procedure.

F. MEANS OF TRANSMISSION

10. In accordance with Article 6(a) of the Procedure all communications concerning this case were transmitted electronically.

G. PROCEDURAL STEPS

11. The Objection in this case was submitted on 13 March 2013. Applicant's Response was submitted on 16 May 2013.

12. The Expert in this case was appointed by the Chairman of the Standing Committee of the ICC International Centre for Expertise on 12 June 2013. The file was transmitted to the Expert by the ICC International Centre for Expertise on 16 July 2013. The Expert is the sole member of the Panel in accordance with Article 13 of the Procedure.

13. Following the transmission of the file the Expert wrote to the Parties on 19 July 2013, so as to begin the organization of the proceedings.

14. On 29 July 2013, the Objector submitted to the ICC International Centre for Expertise a Request for Leave to File Additional Submission in reply to Applicant's Response to Objection. Upon the instructions of the ICC International Centre for Expertise the Objector referred the Request to the Expert on 30 July 2013.

15. On 30 July 2013, the Expert invited the Applicant to comment on the Objector's Request. The Applicant submitted its comments on 31 July 2013. Further comments on the topic were made by the Objector and by the Applicant on 31 July and 1 August respectively.

16. On 2 August 2013 the Expert decided that this Request was denied, stating to this effect the following:

> "Having examined the file and the information and arguments submitted by the Objector and the Applicant, the Expert is of the opinion that it contains all the necessary elements required to reach a Determination on this dispute. Accordingly the Expert considers that there is no need to invite additional submissions as envisaged under Article 17 (a) of the Procedural Rules governing these proceedings.
>
> The Expert further notes the Applicant's comment to the effect that under Article 18 of the Procedural Rules production of documents is limited to exceptional cases. No such exceptional case exists at this time.
>
> On the basis of these considerations the Request is denied and its contents are not to be included in the file of this case. This is without prejudice to the possibility that if the Expert finds there is a need for further information as is prepares its Determination, it may invite the parties to provide this information as envisaged under Article 18."

17. No hearings were held in this case.

18. The Expert´s Determination was transmitted to the ICC International Centre for Expertise on 22 August 2013 within the 45 day period envisaged in Article 21(a) of the Procedure.

19. On 10 October 2013 the Objector submitted a further Request for the Expert to consider some additional material that became available on the Applicant's Application. The Applicant replied to this Request on 11 October 2010. On this last date the Expert did not accept this Request in view that the draft Determination had already been submitted to the ICC International Centre for Expertise. Additional comments from the Objector were received following this ruling by the Expert.

III. OBJECTOR'S STANDING TO FILE A COMMUNITY OBJECTION

20. Article 3.2.2.4 of the Guidebook identifies the requirements for filing a Community Objection. These requirements refer to the need for the Objector to be an established institution which has an ongoing relationship with a clearly delineated community, indicating the main criteria that must be proved to the satisfaction of the Expert.

21. The Parties' have different views about whether these requirements have been met as will be summarized below. The Expert should note at the outset that since the Objection in this case is based on that concerning the .Music domain name as submitted in Case Number EXP/461/ICANN/78 occasionally "music", "song" and "tunes" are used by the Objector interchangeably in this case.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

22. The Objector in this case firstly notes the importance of the Independent Music Sector since the beginning of the recording industry and identifies the American Association of Independent Music (A2IM) with such community, on whose behalf it objects to the Application here considered. The

community is described as a broad coalition of music labels comprising over 32.6% of the United States music industry market share.

23. As the independent music sector represents the largest market share of commercial music, including 90% of music released, the Objector asserts that it represents a significant portion of that community. Member labels of A2IM represent a clearly delineated community. It notes the non-profit trade nature of this organization. In turn the Objector maintains that the Associate members of A2IM represent a significant portion of the global music community.

24. It is also argued that A2IM represents a significant portion of the music community making up the World Independent Network (WIN), to which it provides advocacy and representation services, commerce opportunities and other services, thus providing a central, positive voice for independent music companies. Among the many objectives listed for A2IM, fair trade, technology and distribution and media access are noted.

25. The clearly delineated community of substantial size that A2IM represents, it explains, includes the United States Independent label music community, WIN, the Association of Independent Music, the Independent Music Companies Association (IMPALA) and Medlin Network. Collectively, all such associations constitute a significant portion of the music community to which the string is explicitly or implicitly targeted. All such entities substantially oppose the Application.

26. The Application which is objected to creates, in the Objector's view, material economic detriment to millions of independent music entities as it would prevent registering domains under popular music-themed strings, such as .Song. It also asserts that the improved access to music consumers and independent music businesses is critical for efficient music distribution. This would inevitably result in strengthening the position of the Applicant as the second largest online music retailer, while such Applicant would take 30% in "middle-man" fees as opposed to the 100% of sales independents would

receive if they were allowed to compete under a verified community-based music-themed string.

27. The Objector further maintains that Amazon has a history of market power abuse resulting in detrimental mass copyright infringement, noting its large advertising in Google ad-funded pirate networks.

B. THE APPLICANT'S POSITION AND ARGUMENTS

28. The Applicant in its Response maintains that the Objector lacks standing to file the Objection as it has failed to prove that it is an established institution associated with a clearly delineated community as mandated under Article 3.2.2.4 of the Guidebook. The Applicant considers that the community the Objector purports to represent is excessively large, diverse and complex and thus it is not clearly delineated. In the best of cases the Objector could represent one segment of a portion of the music community, such as the "American" component indicated in the Objector's name.

29. Neither does the Objector qualify as an established institution in the Applicant's view, lacking adequate global recognition, lacking evidence as to the length of time it has been in existence, except for a reference in passing about a seven-year existence, and also lacking public historical evidence of its existence such as a formal charter or national or international registration, or validation by means of a government, inter-governmental organization or treaty. Neither does the Objector offer evidence about qualifying as a not-for-profit trade organization.

30. The Applicant asserts further that the Objector has not proved its ongoing relationship with the clearly delineated community envisaged, such as the presence of mechanisms for participation, requirements of membership and specific activities undertaken on a regular basis for the benefit of members. The lack of evidence concerning the institutional purpose related to the

benefit of the associated community is also discussed by the Applicant, since the Objector indicated only very general goals such as promoting sector opportunity or improving business conditions. Neither is there any level of formal boundaries of the community identified. According to the Applicant, the Objector's stated information is too vague and general to meet any of these requirements.

C. THE EXPERT'S FINDINGS

31. The Expert must first determine whether the Objector is an institution and meets the standing requirement of Article 3.2.2.4 of the Guidebook in respect of Community Objections. The Expert finds that the Objector is indeed a legally established institution although this requirement must also be examined in the light of the factors listed in that Article so as to determine whether such institution meets the substantive requirements of its standing as an Objector for the purpose of this procedure. Such factors include but are not limited to the level of global recognition of the Objector, the length of time of its existence and the public historic evidence of such existence, with reference to some specific examples.

32. The level of global recognition of the Objector is in the Expert's view very limited. While there is reference to some associations of an international scope this does not mean that it is the Objector that has qualified as a globally recognized institution. In fact, as the Applicant has noted, the Objector would be rather related to the "American" music industry and not to a global level of recognition.

33. The letters the Objector has submitted in support of its Objection in Appendix H thereto are in essence produced by its current or former board members, all written in mostly identical terms, thus falling short of the requirement of global recognition (See for example letters from Alligator, 19 February 2013; Beggars Group US, 21 February 2013; BMLG, 9 February 2013). Most of such letters originate in United States based companies, with only a few exceptionally originating elsewhere, mainly in Australia,

Belgium, Germany, Canada and South Africa, and still fewer having some regional or international scope. In the context of a global market with a significant number of participants from many continents and countries, the requirement of a global recognition calls for expressions of support of many organizations or institutions constituting the community, a standard not met in the case of the Objection considered.

34. The Objector has also supplied in Appendix H to the Objection a long list of members of the International Federation of Arts Councils and Culture Agencies (IFACCA), comprising many governmental institutions around the world, but with the indication that while dotMusic has been given "in-principle approval by the board of IFACCA, it has not been endorsed by individual member organizations" (.MUSIC (DOTMUSIC) Supporting Music Community Organizations, first list under Appendix H, second paragraph). In this context it becomes quite clear that governmental institutions have not considered any form of participation in respect of this Objection. A still longer list and description of the members of the International Association of Music Information Centres is supplied, also in Appendix H, but the Objector only refers in respect of some of them to the prospective activity of working with such institutions. No specific agreements or activities are listed. These listings are comprehensive but offer no specific relationship with the Objector so that their probative value is null.

35. The letters and other material produced in support of the Objection evidence that while there are a number of institutions concerned with the gTLD registration in this ambit, this concern, legitimate as it might be, does not alter the fact that no specific community can be identified and hence the representative character of the Objector is more speculative than real. The letters have been considered by the Expert but they cannot justify a conclusion different from what is here noted.

36. The Applicant has also noted that as to the requirement to provide evidence of the time the Objector has been in existence, the Objection only indicates its existence for seven years. In the Expert's view this is enough to meet this

particular criterion of the Guidebook as the main concern of the governing rules is to ensure that the Objector will not have been established solely in conjunction with the gTLD application process.

37. The public historical evidence of its existence is also weak but the Expert is mindful that the factors listed in Article 3.2.2.4 of Module 3 of the ICANN Guidebook are mere indications and not an exhaustive list.

38. The Expert thus concludes as regards the factors listed in respect of the requirement of the Objector being an established institution under Article 3.2.2.4 of the Guidebook that the Objector has proven its existence during a period of time sufficient to give it the standing to file an Objection. The factors relating to global recognition or the public historical evidence about its existence also indicated in that Article have not, however, been adequately met. The Panel turns now to the examination of other requirements under the Article in question which might shed light on the Objector's standing.

39. The second main requirement under Article 3.2.2.4 of the Guidebook is that the Objector must have an ongoing relationship with a clearly delineated community. The factors to be considered to this end are also clearly provided by that Article, notably the presence of mechanisms for participation, institutional purposes for the benefit of the community, performance of regular activities to this end and the level of formal boundaries of the community. Again here the evidence offered by the Objector in respect of this requirement is weak in several aspects. The Objector in his Objection is only listing mechanisms for participation in activities, membership and leadership which are mostly related to very general institutional goals; however, the Objector does not offer specific criteria or examples of such participation. The same is true of the institutional purpose related to the benefit of the associated community. How such purported benefits are to be achieved remains largely unexplained.

40. The very existence of a clearly delineated community is doubtful as any meaningful formal boundaries will be too broad and difficult to identify. The Expert is called to perform a balancing of the various factors discussed and other relevant information, and the Objector is not expected to satisfactorily meet every such factor in order to attain adequate standing to file an Objection. Indeed, Article 3.2.2.4 of the Guidebook *in fine* provides: "The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements". In spite of the best efforts to attain such a balanced consideration the fact remains that the nature of the community in question does lend itself to serious doubts. The Expert thus concludes that the Objector's standing also fails in connection with the various factors that must be considered in the light of an ongoing relationship with a clear delineated community.

41. The Objector's argument has not clearly differentiated the question of its standing from the discussion of the merits of the Objection. While there is some connection between the two sets of conditions, particularly as both Articles 3.2.2.4 and 3.5.4 of the Guidebook refer to a clearly delineated community, the first on standing and the second on the merits, the essence of the respective requirements is different. Aside the fact that the latter Article embodies a number of other requirements that must be met in their totality, the threshold in connection to the specific factor of a clearly delineated community appears to be less demanding in respect of standing than in respect of the merits, as this last one requires in particular a "strong" association between the community invoked and the gTLD string objected to. Notwithstanding these differences the Expert will consider also the various standards governing the merits of the Objection before reaching a final determination on the arguments put forth by the Objector in support of its Objection.

IV. THE SUBSTANTIVE STANDARDS GOVERNING THE MERITS OF THE OBJECTION

42. Article 3.5.4 of the Guidebook sets out the standards applicable to a Community Objection. This Article provides as follows in its opening paragraph:

> "The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:
> • The community invoked by the objector is a clearly delineated community; and
> • Community opposition to the application is substantial; and
> • There is a strong association between the community invoked and the applied-for gTLD string; and
> • The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below".

43. The Parties have expressed again differing views about the meaning of these standards and about whether the Objector meets the requirements set out under the Article noted. The respective positions will be summarized next.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

44. The Objection emphasizes the fourth test quoted above, namely the likelihood of material damage posed by the Application. The Objector's position on the other three tests is largely subsumed under the considerations made in connection with standing discussed above.

45. The Objection asserts that the Application creates a likelihood of material detriment to the rights and interests of a significant portion of the music community to which the string is targeted as competition will be affected by Amazon's market power in ecommerce and its inter-related monopoly.

Amazon is described as being by far the largest internet retailer with online sales surpassing US$ 48 billion. Amazon and Apple have established a duopoly amounting to 80% of the online music retail market.

46. The size, diversity and significance of "music" is reflected in the fact that this keyword is the most searched internet category with 226 million monthly Google searches, to which other music-related keywords should be added to reach billions of searches. Amazon's music-themed string would be granted a powerful domain monopoly that would include many related keywords, including "songs". The Objector refers in this context to the Application's statement admitting a monopoly position in ecommerce. Artists and musicians would be unable to register a .Song domain to legally compete with Amazon on the Internet. The business goals of Amazon would result in a closely managed TLD by registering domains through a single registrar that would prevent the activities of re-sellers in .Music and the existence of a market in .Music domains. (The Expert must note that while the Objection refers in this context to ".Music", in fact it is making an argument in respect of ".Song").

47. The Objection maintains that the Application thus completely and diametrically contradicts ICANN's objectives to increase competition and other ICANN Core Values, such as seeking informed participation. In the Objector's view the Applications made for .Music and .Tunes only make the situation worse. Objections to these other Applications will be as noted decided under separate Expert's Determinations.

48. The absence of a market place will create a definite likelihood of material harm to the legitimate interests of the music community, compounded by the fact that Amazon is the second largest advertiser in Google ad-funded pirate networks. The annual harm caused by piracy has been estimated at US$ 12.5 billion. Amazon's long history of anti-competitive behavior would thus be further enhanced. The Objection notes in particular the fact that Amazon received an ICANN Government Advisory Committee (GAC) Early Warning for all its string applications based on competition grounds as it

would exclude other entities and potential competitors from using the TLD. All such consequences would result in breach of both United States and European Union anti-trust legislation and regulations.

B. THE APPLICANT'S POSITION AND ARGUMENTS

49. The Applicant asserts that the Objector has failed to meet the four tests envisaged under Article 3.5.4 of the Guidebook.

50. The Objector first omits providing any evidence about the level of public recognition of the group as a community at a local and/or global levels, a requirement which as noted is intertwined with that concerning standing. It is thus not possible to ascertain the level of public recognition of such purported community. The same holds true for the requirements concerning the formal boundaries of the community, the length of time it has been in existence, the global distribution of the community and the number of people or entities that belong to such community.

51. The Applicant maintains next that the Objector has not proven substantial opposition to the Application within the community it purports to represent. The letters attached as Appendix H of the Objection do not show whether they represent a sizable proportion of the relevant community, nor do they explain how many members does the Objector have and its comparison with the relative composition of the community.

52. It follows that it is not possible to ascertain either the representative nature of the entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among the sources expressing opposition, the historical defense of the community in other contexts or the costs incurred in expressing opposition by means of other channels. The Applicant notes that during the three-month period during which the public was invited to submit comments on gTLD applications no comments were received from the Objector opposing the .Songs Application.

(The Expert again notes that while the term "music" is used in this context the argument made concerns "songs" domains).

53. The Applicant also maintains that the Objector has failed to meet the third test of the applicable standards as no proof is provided about a strong association between the string applied for and the community allegedly represented by the Objector. In fact, there is no reference in the Application to "independent music" nor does the Objector invoke any other public statement by the Applicant reflecting a strong association with such community. Similarly no evidence of the public having associated the Application to a targeting of the community in question has been provided by the Objector, a factor, among other, also listed in Article 3.5.4 of the Guidebook as a test of whether the Objection can prevail on the merits.

54. The Applicant emphasizes that the mission of the .Song registry is to create a dedicated platform for Amazon which would provide additional controls of the technical architecture of this domain, offering a stable and secure foundation for online communication, as it would also provide a platform for innovation and the protection of intellectual property rights, none of which relate to the existence of a strong association between the string in question and the community the Objector claims to represent.

55. The fourth and last test under the Article 3.5.4 of the Guidebook is that concerning the likelihood of material detriment arising from the Application. The Applicant asserts in this respect that the Objector has failed to address or provide evidence about any of the six factors listed under the Article, namely the nature and extent of the damage to the reputation of the community, that the Applicant does not intend to act in accordance with the interests of the community, interference with the core activities of the community, dependence of the community on the Domain Name System (DNS) for its core activities, nature and extent of concrete or economic damage to the community, and level of certainty that detrimental outcomes would occur.

56. The Applicant asserts that the Objector's views that the Application will thwart competition are unsupported and ignore many comments submitted to ICANN to the contrary by a number of relevant institutions collected in Annex 14 of the Response. These comments include those submitted by institutions, scholars and ICANN's At-Large Advisory Committee to the effect that TLDs would foster innovation, result in strong benefits, facilitate online innovation and foster competition.

57. The Applicant further explains that accusations about market power abuse, pirate networks, anti-competitive behavior, exclusive access and other such statements are irrelevant, inaccurate or misleading. Registration of .Song domains by the Applicant and related second level registrations would not result in any anti-competitive effects as experience with other kinds of registration shows. Moreover, similar domain names, such as "music.com", have been registered by entities other than the Objector apparently without creating any illegal monopoly or causing any harm to the Objector. (The Expert again notes that while "music.com" is used in this context the argument made concerns "song" domains).

C. THE EXPERT'S FINDINGS

58. The Expert must first determine in respect of the merits of the Objection whether there is in existence a clearly delineated community, which is the first factor listed in Article 3.5.4 of the Guidebook. The conclusion on this point is not different from what was already indicated in paragraphs 22, 35 and 40 above since there is a broad coalition of music labels without formal delineation as a community. The Expert is mindful in this respect of the comments made by Professor Alain Pellet in his role of the Independent Objector established for the dispute resolution process under ICANN, which have been introduced in the record by the Applicant as pertinent to this Objection. Under Article 3.2.5 of the Guidebook the Independent Objector does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

59. The Independent Objector has concluded that after reviewing all applications made to ICANN "it is difficult in these cases to prove the existence of a clearly delineated community" because of the broad scope of a generic term (Allain Pellet: "The Issue of "Closed Generic" gTLDs Applications-The Views of the Independent Objector", 16 May 2013, para. 4, Annex 6 of Applicant's Response to the Objection). The Independent Objector further concludes that in most cases "such a delineated community does not exist" (Ibid. para. 5).

60. This Expert agrees with such comments insofar they are relevant for this particular dispute as in fact the generic nature of the term that identifies a given TLD, such as that with which the Application in this case is concerned, implies by necessity its use by many people and therefore lacks the specificity that would allow for its clear delineation. A broad community may exist at the generic level, as indeed would be the case of "Song" because of the number of entities that will use this term, but this is not conducive to the clear delineation envisaged under this standard.

61. As a consequence of the above, the specific criteria set out under the standard of Article 3.5.4 of the Guidebook for identifying a clearly delineated community are quite difficult to meet. The Applicant convincingly argues that the Objector has failed to produce evidence on any such criteria, with reference to the public recognition of the group as a community, the formal boundaries of the community and persons considered to form a part of it, the length of time about its existence, its global distribution and the number of people or entities composing such community. It is not difficult to realize that this lack of evidence is the result of the community envisaged being too broad.

62. The question of substantial opposition is not different. In point of fact Article 3.5.4 of the Guidebook sets out a number of conditions that must be satisfied by the Objector for the Objection to prevail. Among other factors considered there is the number of expressions of opposition relative to the composition

of the community, the representative nature of entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among sources of expressions of opposition, including regional, subsectors, leadership and membership diversity, the historical defense of the community in other contexts and the costs incurred by objector in expressing opposition.

63. Whether the number of expressions of opposition relative to the composition of the community can be measured in some way is difficult to establish as the purported community itself is overly broad. With billions of users the expressions of opposition would need to run in high numbers to meet this test. Further, as noted in para. 33 above, the letters accompanying the Objection do not seem to be overly representative of such community and some of the entities expressing opposition do not appear to be very representative either, even within the sectors to which they are associated.

64. The level of recognized stature or weight among sources of opposition as expressed in the letters and material submitted by the Objector is also difficult to compare because the description of such sources and the information supplied is not sufficiently detailed to draw a comparison. It is also quite evident that this situation makes it impossible for the Objector to provide evidence about the defense of the community in other contexts or to provide the description and costs of other channels used to convey opposition.

65. The Expert must turn now to the issue of whether the Application has in some way targeted the Objector's community. Under Article 3.5.4 of the Guidebook the criteria indicated to determine whether targeting has occurred includes statements contained in the application, other public statements by the applicant and associations by the public. On the assumption that such a community exists, the Objector must still prove "a strong association" between the gTLD string applied for and the community which it claims to represent.

66. While an association exists of course between the gTLD applied for and the term "song", this is by definition a generic term that might relate to songs in general but not specifically to the "independent music community" the Objector claims to represent. The Applicant has explained that the Application does not refer to such a community at all nor are there other statements indicating a strong association or statements that might have triggered an association by the public of such targeting. The extremely broad definitions of song that the Applicant sets out in Annex 13 of its Response is enough to realize that none of those definitions lend themselves to establish a strong association with the community in the present case.

67. The last test on which the Expert must reach a determination is that concerning a likelihood of material detriment. The scope of the standard is quite precise on this matter. Two distinct kinds of damage are considered in Article 3.5.4 of the Guidebook, the first being the nature and extent of damage to the reputation of the community, and the second the nature and extent of concrete or economic damage to the community. In either kind of damage the Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. In addition said Article requires evidence that the Applicant does not intend to act in accordance with the interests of the community, that there will be interference with the core activities of the community and dependence of such community on the DNS for its core activities. In the end the level of certainty that detrimental outcomes would occur has to be established.

68. The Objector has not proved the likelihood of either kind of damage occurring as a result of the eventual approval of the Application. The Expert does not consider that it is likely that the reputation of the community could in any way be affected by this Application nor is the reputation of A2IM or any of its members at issue. Whether there would be a likelihood of concrete or economic damage to the community caused by the Application were it to succeed has not been established either. While, as noted in paragraphs 22, 23 and 48 above, the Objector has indicated figures concerning the market

participation that could be affected and some general estimate of the amounts potentially involved in damages, this does not appear to be related to the interests of a specific community which the Objector purports to represent but rather refers to the global market in general.

69. In essence the discussion concerns the question whether competition will be thwarted as the Objector believes, or not affected at all as the Applicant asserts. The Expert is mindful in this respect of the various institutional and scholarly opinions submitted by the Applicant to the effect that closed domains and unified registration, while entailing some restrictions, result rather in promoting online innovation and reduce the risk of abusive registrations. Opinions to the contrary submitted by the Objector are rather tenuous and do not address specifically some of the main issues underlying this discussion, in particular whether damage of some kind is likely to occur and competition affected as a result.

70. Whether there is market power abuse, support for pirate networks and anti-competitive behavior, as the Objector argues, is not something that can be established beforehand and is thus purely speculative. Should there be any such consequence competition regulators will very well know how to address this problem, certainly in the context of United States and European Union legislation which the Objector invokes. Any affected entity, including the Objector, would be able to request investigations in that event.

71. It is thus not possible to conclude that there is in this case a likelihood of concrete or economic damage to the community or that the Applicant intends to act contrary to the interests of such community or interfere with its activities. The dependence of the community on the DNS for its core activities has not been proven either as many other kinds of registration of second level domain names has not resulted in hampering those activities. In fact the Applicant explains that the use of, for example, “cars.com” has not resulted in any restriction of competition in that market, as neither has the use of “music.com”, or “musician.com” (Applicant’s Response, p. 14). (The

Expert here again notes that references to "music" are made in the context of the argument concerning "songs").

72. The Expert is directed to apply the very conclusions made explicit by the standards discussed, which are three in number:

> "If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail" (Article 3.5.4 of the Guidebook, "Community", *in fine*).
>
> "If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail" (Article 3.5.4 of the Guidebook, "Substantial opposition", *in fine*).
>
> If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail" (Article 3.5.4 of the Guidebook, "Detriment", *in fine*).

73. The Objection has not satisfied any of these requirements, which under Article 3.5.4 of the Guidebook are moreover cumulative. Even if the standing requirements would have been met, which is not the case, the Objection fails on the merits.

74. The Expert has no objection to the publication of this Determination in the ICC's webpage.

V. DECISION

For the above reasons and according to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)'s Objection is dismissed.

2. Applicant AMAZON EU S.À R.L. prevails.

3. AMAZON EU S.À R.L.'s advance payment on costs shall be refunded by the ICC International Centre for Expertise to AMAZON EU S.À R.L..

Date: 6 December 2013

Signature: _____

Professor Francisco Orrego Vicuña

Expert

THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/480/ICANN/97

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

AMAZON EU S.À R.L.

(LUXEMBOURG)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL CENTRE FOR EXPERTISE

CASE NUMBER

EXP/480/ICANN/97
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

OBJECTION TO .TUNES (DOT TUNES)

CONCERNING APPLICATION ID 1-1317-30761

CONSOLIDATED WITH CASES EXP/461/ICANN/78, EXP/479/ICANN/96
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG) and
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
AMAZON EU S.À R.L. (LUXEMBOURG)

EXPERT DETERMINATION

By

PROFESSOR FRANCISCO ORREGO VICUÑA

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ABBREVIATIONS

"Applicant" is an entity that has applied to ICANN for a new gTLD.

"Application" is the submission to ICANN of a request for registration of a new gTLD.

"Community Objection" is the objection to an Application on the basis of substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.

"DNS" is the Domain Name System.

"DRSP Rules" are the Rules for Expertise of the International Chamber of Commerce applicable to a "Community Objection".

"Expert" is a member of a panel constituted with one expert.

"Expert Determination" is the decision on the merits of an Objection rendered by a panel under the applicable DRSP Rules.

"Respondent" is the Applicant responding to the Objection.

"Objection" is the filing in ICANN opposing registration of a new gTLD for which an Application has been submitted.

"Objector" is one or more persons or entities who have filed an objection against a new gTLD for which an Application has been submitted.

"Panel" is the panel of Experts constituted by the Dispute Resolution Service Provider.

"gTLD" is a New Generic Top-Level Domain.

"GAC" is the ICANN Government Advisory Committee.

"ICANN" is the Internet Corporation for Assigned Names and Numbers.

"ICC" is the International Chamber of Commerce.

"IFACCA" is the International Federation of Arts Councils and Culture Agencies.

"Procedure" is the New gTLD Dispute Resolution Procedure, attachment to Module 3 of the gTLD Applicant Guidebook.

"TLD" is a Top-Level Domain.

EXPERT DETERMINATION

IN THE CASE

EXP/480/ICANN/97

(CONSOLIDATED WITH CASES EXP/461/ICANN/78, EXP/479/ICANN/96)

OBJECTION TO THE APPLICATION IN RESPECT OF THE TOP LEVEL DOMAIN NAME .TUNES (DOT TUNES) (APPLICATION ID 1-1317-30761)

I INTRODUCTION

1. This Expert Determination is adopted in the above-referenced case under the New Generic Top-Level Domain (gTLD) Names Dispute Resolution Procedure of the Internet Corporation for Assigned Names and Numbers (ICANN), administered by the International Centre for Expertise of the International Chamber of Commerce (ICC).

A. THE OBJECTOR

2. The Objector in this case is:

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

Mr. Rich Bengloff
Contact Information Redacted

Telephone: Contact Information Redacted
Email Contact Information Redacted

The Objector is represented by:

DOTMUSIC

Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

and

ESQWIRE.COM, P.C.

Mr. Jason B. Schaeffer

Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

B. THE APPLICANT

3. The Applicant in this case is:

AMAZON EU S.À R.L.

Ms. Lorna Jean Gradden

Contact Information Redacted

Telephone: Contact Information Redacted

Email: Contact Information Redacted

The Applicant is represented by:

THE GIGALAW FIRM

Mr. Douglas M. Isenberg

Contact Information Redacted

USA Contact Information Redacted
Telephone :
Email: Contact Information Redacted

C. THE EXPERT

4. The appointed Expert in this case is:

Professor Francisco Orrego Vicuña
Contact Information Redacted

Telephone: Contact Information Redacted
Email: Contact Information Redacted

II. PROCEDURE

A. GOVERNING RULES

5. This case is governed by the Rules for Expertise of the ICC, supplemented by the ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (Procedure), as well as by the Articles and rules established in the Applicant Guidebook noted.

B. PLACE OF THE PROCEEDINGS:

6. The place of the proceedings is, in accordance with Article 4 (d) of the Procedure, location of the ICC International Centre for Expertise in Paris, France.

C. NATURE OF THE OBJECTION

7. The Objection is made on the ground of Community Objection in accordance with Article 2 of the Procedure.

D. CONSOLIDATION

8. The ICC International Centre for Expertise informed the parties on 24 April 2013, that case EXP/480/ICANN/97 was to be consolidated with cases EXP/461/ICANN/78 and EXP/479/ICANN/96 pursuant to Article 12 of the Procedure. These other cases are the subject of separate Expert Determinations.

E. LANGUAGE

9. All submissions and correspondence in these cases have been made in English in accordance with Article 5(a) of the Procedure.

F. MEANS OF TRANSMISSION

10. In accordance with Article 6(a) of the Procedure all communications concerning this case were transmitted electronically.

G. PROCEDURAL STEPS

11. The Objection in this case was submitted on 13 March 2013. Applicant's Response was submitted on 16 May 2013.

12. The Expert in this case was appointed by the Chairman of the Standing Committee of the ICC International Centre for Expertise on 12 June 2013. The file was transmitted to the Expert by the ICC International Centre for Expertise on 16 July 2013. The Expert is the sole member of the Panel in accordance with Article 13 of the Procedure.

13. Following the transmission of the file the Expert wrote to the Parties on 19 July 2013, so as to begin the organization of the proceedings.

14. On 29 July 2013, the Objector submitted to the ICC International Centre for Expertise a Request for Leave to File Additional Submission in reply to Applicant's Response to Objection. Upon the instructions of the ICC International Centre for Expertise the Objector referred the Request to the Expert on 30 July 2013.

15. On 30 July 2013, the Expert invited the Applicant to comment on the Objector's Request. The Applicant submitted its comments on 31 July 2013. Further comments on the topic were made by the Objector and by the Applicant on 31 July and 1 August respectively.

16. On 2 August 2013 the Expert decided that this Request was denied, stating to this effect the following:

> "Having examined the file and the information and arguments submitted by the Objector and the Applicant, the Expert is of the opinion that it contains all the necessary elements required to reach a Determination on this dispute. Accordingly the Expert considers that there is no need to invite additional submissions as envisaged under Article 17 (a) of the Procedural Rules governing these proceedings.
>
> The Expert further notes the Applicant's comment to the effect that under Article 18 of the Procedural Rules production of documents is limited to exceptional cases. No such exceptional case exists at this time.
>
> On the basis of these considerations the Request is denied and its contents are not to be included in the file of this case. This is without prejudice to the possibility that if the Expert finds there is a need for further information as is prepares its Determination, it may invite the parties to provide this information as envisaged under Article 18."

17. No hearings were held in this case.

18. The Expert´s Determination was transmitted to the ICC International Centre for Expertise on 22 August 2013 within the 45 day period envisaged in Article 21(a) of the Procedure.

19. On 10 October 2013 the Objector submitted a further Request for the Expert to consider some additional material that became available on the Applicant's Application. The Applicant replied to this Request on 11 October 2010. On this last date the Expert did not accept this Request in view that the draft Determination had already been submitted to the ICC International Centre for Expertise. Additional comments from the Objector were received following this ruling by the Expert.

III. OBJECTOR'S STANDING TO FILE A COMMUNITY OBJECTION

20. Article 3.2.2.4 of the Guidebook identifies the requirements for filing a Community Objection. These requirements refer to the need for the Objector to be an established institution which has an ongoing relationship with a clearly delineated community, indicating the main criteria that must be proved to the satisfaction of the Expert.

21. The Parties' have different views about whether these requirements have been met as will be summarized below. The Expert should note at the outset that since the Objection in this case is based on that concerning the .Music domain name as submitted in Case Number EXP/461/ICANN/78 occasionally "music", "song" and "tunes" are used by the Objector interchangeably in this case.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

22. The Objector in this case firstly notes the importance of the Independent Music Sector since the beginning of the recording industry and identifies the American Association of Independent Music (A2IM) with such community, on whose behalf it objects to the Application here considered. The community is described as a broad coalition of music labels comprising over 32.6% of the United States music industry market share.

23. As the independent music sector represents the largest market share of commercial music, including 90% of music released, the Objector asserts that it represents a significant portion of that community. Member labels of A2IM represent a clearly delineated community. It notes the non-profit trade nature of this organization. In turn the Objector maintains that the Associate members of A2IM represent a significant portion of the global music community.

24. It is also argued that A2IM represents a significant portion of the music community making up the World Independent Network (WIN), to which it provides advocacy and representation services, commerce opportunities and other services, thus providing a central, positive voice for independent music companies. Among the many objectives listed for A2IM, fair trade, technology and distribution and media access are noted.

25. The clearly delineated community of substantial size that A2IM represents, it explains, includes the United States Independent label music community, WIN, the Association of Independent Music, the Independent Music Companies Association (IMPALA) and Medlin Network. Collectively, all such associations constitute a significant portion of the music community to which the string is explicitly or implicitly targeted. All such entities substantially oppose the Application.

26. The Application which is objected to creates, in the Objector's view, material economic detriment to millions of independent music entities as it would prevent registering domains under popular music-themed strings, such as .Tunes. It also asserts that the improved access to music consumers and independent music businesses is critical for efficient music distribution. This would inevitably result in strengthening the position of the Applicant as the second largest online music retailer, while such Applicant would take 30% in "middle-man" fees as opposed to the 100% of sales independents would receive if they were allowed to compete under a verified community-based music-themed string.

27. The Objector further maintains that Amazon has a history of market power abuse resulting in detrimental mass copyright infringement, noting its large advertising in Google ad-funded pirate networks.

B. THE APPLICANT'S POSITION AND ARGUMENTS

28. The Applicant in its Response maintains that the Objector lacks standing to file the Objection as it has failed to prove that it is an established institution associated with a clearly delineated community as mandated under Article 3.2.2.4 of the Guidebook. The Applicant considers that the community the Objector purports to represent is excessively large, diverse and complex and thus it is not clearly delineated. In the best of cases the Objector could represent one segment of a portion of the music community, such as the "American" component indicated in the Objector's name.

29. Neither does the Objector qualify as an established institution in the Applicant's view, lacking adequate global recognition, lacking evidence as to the length of time it has been in existence, except for a reference in passing about a seven-year existence, and also lacking public historical evidence of its existence such as a formal charter or national or international registration, or validation by means of a government, inter-governmental organization or treaty. Neither does the Objector offer evidence about qualifying as a not-for-profit trade organization.

30. The Applicant asserts further that the Objector has not proved its ongoing relationship with the clearly delineated community envisaged, such as the presence of mechanisms for participation, requirements of membership and specific activities undertaken on a regular basis for the benefit of members. The lack of evidence concerning the institutional purpose related to the benefit of the associated community is also discussed by the Applicant, since the Objector indicated only very general goals such as promoting sector opportunity or improving business conditions. Neither is there any level of formal boundaries of the community identified. According to the Applicant, the Objector's stated information is too vague and general to meet any of these requirements.

C. THE EXPERT'S FINDINGS

31. The Expert must first determine whether the Objector is an institution and meets the standing requirement of Article 3.2.2.4 of the Guidebook in respect of Community Objections. The Expert finds that the Objector is indeed a legally established institution although this requirement must also be examined in the light of the factors listed in that Article so as to determine whether such institution meets the substantive requirements of its standing as an Objector for the purpose of this procedure. Such factors include but are not limited to the level of global recognition of the Objector, the length of time of its existence and the public historic evidence of such existence, with reference to some specific examples.

32. The level of global recognition of the Objector is in the Expert's view very limited. While there is reference to some associations of an international scope this does not mean that it is the Objector that has qualified as a globally recognized institution. In fact, as the Applicant has noted, the Objector would be rather related to the "American" music industry and not to a global level of recognition.

33. The letters the Objector has submitted in support of its Objection in Appendix H thereto are in essence produced by its current or former board members, all written in mostly identical terms, thus falling short of the requirement of global recognition (See for example letters from Alligator, 19 February 2013; Beggars Group US, 21 February 2013; BMLG, 9 February 2013). Most of such letters originate in United States based companies, with only a few exceptionally originating elsewhere, mainly in Australia, Belgium, Germany, Canada and South Africa, and still fewer having some regional or international scope. In the context of a global market with a significant number of participants from many continents and countries, the requirement of a global recognition calls for expressions of support of many organizations or institutions constituting the community, a standard not met in the case of the Objection considered.

34. The Objector has also supplied in Appendix H to the Objection a long list of members of the International Federation of Arts Councils and Culture Agencies (IFACCA), comprising many governmental institutions around the world, but with the indication that while dotMusic has been given "in-principle approval by the board of IFACCA, it has not been endorsed by individual member organizations" (.MUSIC (DOTMUSIC) Supporting Music Community Organizations, first list under Appendix H, second paragraph). In this context it becomes quite clear that governmental institutions have not considered any form of participation in respect of this Objection. A still longer list and description of the members of the International Association of Music Information Centres is supplied, also in Appendix H, but the Objector only refers in respect of some of them to the prospective activity of working with such institutions. No specific agreements or activities are listed. These listings are comprehensive but offer no specific relationship with the Objector so that their probative value is null.

35. The letters and other material produced in support of the Objection evidence that while there are a number of institutions concerned with the gTLD registration in this ambit, this concern, legitimate as it might be, does not alter the fact that no specific community can be identified and hence the representative character of the Objector is more speculative than real. The letters have been considered by the Expert but they cannot justify a conclusion different from what is here noted.

36. The Applicant has also noted that as to the requirement to provide evidence of the time the Objector has been in existence, the Objection only indicates its existence for seven years. In the Expert's view this is enough to meet this particular criterion of the Guidebook as the main concern of the governing rules is to ensure that the Objector will not have been established solely in conjunction with the gTLD application process.

37. The public historical evidence of its existence is also weak but the Expert is mindful that the factors listed in Article 3.2.2.4 of Module 3 of the ICANN Guidebook are mere indications and not an exhaustive list.

38. The Expert thus concludes as regards the factors listed in respect of the requirement of the Objector being an established institution under Article 3.2.2.4 of the Guidebook that the Objector has proven its existence during a period of time sufficient to give it the standing to file an Objection. The factors relating to global recognition or the public historical evidence about its existence also indicated in that Article have not, however, been adequately met. The Panel turns now to the examination of other requirements under the Article in question which might shed light on the Objector's standing.

39. The second main requirement under Article 3.2.2.4 of the Guidebook is that the Objector must have an ongoing relationship with a clearly delineated community. The factors to be considered to this end are also clearly provided by that Article, notably the presence of mechanisms for participation, institutional purposes for the benefit of the community, performance of regular activities to this end and the level of formal boundaries of the community. Again here the evidence offered by the Objector in respect of this requirement is weak in several aspects. The Objector in his Objection is only listing mechanisms for participation in activities, membership and leadership which are mostly related to very general institutional goals; however, the Objector does not offer specific criteria or examples of such participation. The same is true of the institutional purpose related to the benefit of the associated community. How such purported benefits are to be achieved remains largely unexplained.

40. The very existence of a clearly delineated community is doubtful as any meaningful formal boundaries will be too broad and difficult to identify. The Expert is called to perform a balancing of the various factors discussed and other relevant information, and the Objector is not expected to satisfactorily meet every such factor in order to attain adequate standing to file an Objection. Indeed, Article 3.2.2.4 of the Guidebook *in fine* provides: "The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements". In spite of the best efforts to attain such a balanced consideration the fact remains that the nature of the community in question does lend itself to

serious doubts. The Expert thus concludes that the Objector's standing also fails in connection with the various factors that must be considered in the light of an ongoing relationship with a clear delineated community.

41. The Objector's argument has not clearly differentiated the question of its standing from the discussion of the merits of the Objection. While there is some connection between the two sets of conditions, particularly as both Articles 3.2.2.4 and 3.5.4 of the Guidebook refer to a clearly delineated community, the first on standing and the second on the merits, the essence of the respective requirements is different. Aside the fact that the latter Article embodies a number of other requirements that must be met in their totality, the threshold in connection to the specific factor of a clearly delineated community appears to be less demanding in respect of standing than in respect of the merits, as this last one requires in particular a "strong" association between the community invoked and the gTLD string objected to. Notwithstanding these differences the Expert will consider also the various standards governing the merits of the Objection before reaching a final determination on the arguments put forth by the Objector in support of its Objection.

IV. THE SUBSTANTIVE STANDARDS GOVERNING THE MERITS OF THE OBJECTION

42. Article 3.5.4 of the Guidebook sets out the standards applicable to a Community Objection. This Article provides as follows in its opening paragraph:

> "The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:
> • The community invoked by the objector is a clearly delineated community; and
> • Community opposition to the application is substantial; and
> • There is a strong association between the community invoked and the applied-for gTLD string; and

• The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below".

43. The Parties have expressed again differing views about the meaning of these standards and about whether the Objector meets the requirements set out under the Article noted. The respective positions will be summarized next.

A. THE OBJECTOR'S POSITION AND ARGUMENTS

44. The Objection emphasizes the fourth test quoted above, namely the likelihood of material damage posed by the Application. The Objector's position on the other three tests is largely subsumed under the considerations made in connection with standing discussed above.

45. The Objection asserts that the Application creates a likelihood of material detriment to the rights and interests of a significant portion of the music community to which the string is targeted as competition will be affected by Amazon's market power in ecommerce and its inter-related monopoly. Amazon is described as being by far the largest internet retailer with online sales surpassing US$ 48 billion. Amazon and Apple have established a duopoly amounting to 80% of the online music retail market.

46. The size, diversity and significance of "music" is reflected in the fact that this keyword is the most searched internet category with 226 million monthly Google searches, to which other music-related keywords should be added to reach billions of searches. Amazon's music-themed string would be granted a powerful domain monopoly that would include many related keywords, including "tunes". The Objector refers in this context to the Application's statement admitting a monopoly position in ecommerce. Artists and musicians would be unable to register a .Tunes domain to legally compete with Amazon on the Internet. The business goals of Amazon would result in a closely managed TLD by registering domains through a single registrar that would prevent the activities of re-sellers

in .Music and the existence of a market in .Music domains. (The Expert must note that while the Objection refers in this context to ".Music", in fact it is making an argument in respect of ".Tunes").

47. The Objection maintains that the Application thus completely and diametrically contradicts ICANN's objectives to increase competition and other ICANN Core Values, such as seeking informed participation. In the Objector's view the Applications made for .Music and .Songs only make the situation worse. Objections to these other Applications will be as noted decided under separate Expert's Determinations.

48. The absence of a market place will create a definite likelihood of material harm to the legitimate interests of the music community, compounded by the fact that Amazon is the second largest advertiser in Google ad-funded pirate networks. The annual harm caused by piracy has been estimated at US$ 12.5 billion. Amazon's long history of anti-competitive behavior would thus be further enhanced. The Objection notes in particular the fact that Amazon received an ICANN Government Advisory Committee (GAC) Early Warning for all its string applications based on competition grounds as it would exclude other entities and potential competitors from using the TLD. All such consequences would result in breach of both United States and European Union anti-trust legislation and regulations.

B. THE APPLICANT'S POSITION AND ARGUMENTS

49. The Applicant asserts that the Objector has failed to meet the four tests envisaged under Article 3.5.4 of the Guidebook.

50. The Objector first omits providing any evidence about the level of public recognition of the group as a community at a local and/or global levels, a requirement which as noted is intertwined with that concerning standing. It is thus not possible to ascertain the level of public recognition of such purported community. The same holds true for the requirements concerning the formal boundaries of the community, the length of time it has been in existence, the

global distribution of the community and the number of people or entities that belong to such community.

51. The Applicant maintains next that the Objector has not proven substantial opposition to the Application within the community it purports to represent. The letters attached as Appendix H of the Objection do not show whether they represent a sizable proportion of the relevant community, nor do they explain how many members does the Objector have and its comparison with the relative composition of the community.

52. It follows that it is not possible to ascertain either the representative nature of the entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among the sources expressing opposition, the historical defense of the community in other contexts or the costs incurred in expressing opposition by means of other channels. The Applicant notes that during the three-month period during which the public was invited to submit comments on gTLD applications no comments were received from the Objector opposing the .Tunes Application. (The Expert again notes that while "music.com" is used in this context the argument made concerns "tunes" domains).

53. The Applicant also maintains that the Objector has failed to meet the third test of the applicable standards as no proof is provided about a strong association between the string applied for and the community allegedly represented by the Objector. In fact, there is no reference in the Application to "independent music" nor does the Objector invoke any other public statement by the Applicant reflecting a strong association with such community. Similarly no evidence of the public having associated the Application to a targeting of the community in question has been provided by the Objector, a factor, among other, also listed in Article 3.5.4 of the Guidebook as a test of whether the Objection can prevail on the merits.

54. The Applicant emphasizes that the mission of the .Tunes registry is to create a dedicated platform for Amazon which would provide additional controls of the

technical architecture of this domain, offering a stable and secure foundation for online communication, as it would also provide a platform for innovation and the protection of intellectual property rights, none of which relate to the existence of a strong association between the string in question and the community the Objector claims to represent.

55. The fourth and last test under the Article 3.5.4 of the Guidebook is that concerning the likelihood of material detriment arising from the Application. The Applicant asserts in this respect that the Objector has failed to address or provide evidence about any of the six factors listed under the Article, namely the nature and extent of the damage to the reputation of the community, that the Applicant does not intend to act in accordance with the interests of the community, interference with the core activities of the community, dependence of the community on the Domain Name System (DNS) for its core activities, nature and extent of concrete or economic damage to the community, and level of certainty that detrimental outcomes would occur.

56. The Applicant asserts that the Objector's views that the Application will thwart competition are unsupported and ignore many comments submitted to ICANN to the contrary by a number of relevant institutions collected in Annex 14 of the Response. These comments include those submitted by institutions, scholars and ICANN's At-Large Advisory Committee to the effect that TLDs would foster innovation, result in strong benefits, facilitate online innovation and foster competition.

57. The Applicant further explains that accusations about market power abuse, pirate networks, anti-competitive behavior, exclusive access and other such statements are irrelevant, inaccurate or misleading. Registration of .Tunes domains by the Applicant and related second level registrations would not result in any anti-competitive effects as experience with other kinds of registration shows. Moreover, similar domain names, such as "music.com", have been registered by entities other than the Objector apparently without creating any illegal monopoly or causing any harm to the Objector. (The Expert again notes that while

"music.com" is used in this context the argument made concerns "tunes" domains).

C. THE EXPERT'S FINDINGS

58. The Expert must first determine in respect of the merits of the Objection whether there is in existence a clearly delineated community, which is the first factor listed in Article 3.5.4 of the Guidebook. The conclusion on this point is not different from what was already indicated in paragraphs 22, 35 and 40 above since there is a broad coalition of music labels without formal delineation as a community. The Expert is mindful in this respect of the comments made by Professor Alain Pellet in his role of the Independent Objector established for the dispute resolution process under ICANN, which have been introduced in the record by the Applicant as pertinent to this Objection. Under Article 3.2.5 of the Guidebook the Independent Objector does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

59. The Independent Objector has concluded that after reviewing all applications made to ICANN "it is difficult in these cases to prove the existence of a clearly delineated community" because of the broad scope of a generic term (Allain Pellet: "The Issue of "Closed Generic" gTLDs Applications-The Views of the Independent Objector", 16 May 2013, para. 4, Annex 6 of Applicant's Response to the Objection). The Independent Objector further concludes that in most cases "such a delineated community does not exist" (Ibid. para. 5).

60. This Expert agrees with such comments insofar they are relevant for this particular dispute as in fact the generic nature of the term that identifies a given TLD, such as that with which the Application in this case is concerned, implies by necessity its use by many people and therefore lacks the specificity that would allow for its clear delineation. A broad community may exist at the generic level, as indeed would be the case of "Tunes" because of the number of entities that will use this term, but this is not conducive to the clear delineation envisaged under this standard.

61. As a consequence of the above, the specific criteria set out under the standard of Article 3.5.4 of the Guidebook for identifying a clearly delineated community are quite difficult to meet. The Applicant convincingly argues that the Objector has failed to produce evidence on any such criteria, with reference to the public recognition of the group as a community, the formal boundaries of the community and persons considered to form a part of it, the length of time about its existence, its global distribution and the number of people or entities composing such community. It is not difficult to realize that this lack of evidence is the result of the community envisaged being too broad.

62. The question of substantial opposition is not different. In point of fact Article 3.5.4 of the Guidebook sets out a number of conditions that must be satisfied by the Objector for the Objection to prevail. Among other factors considered there is the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognized stature or weight among sources of opposition, the distribution or diversity among sources of expressions of opposition, including regional, subsectors, leadership and membership diversity, the historical defense of the community in other contexts and the costs incurred by objector in expressing opposition.

63. Whether the number of expressions of opposition relative to the composition of the community can be measured in some way is difficult to establish as the purported community itself is overly broad. With billions of users the expressions of opposition would need to run in high numbers to meet this test. Further, as noted in para. 33 above, the letters accompanying the Objection do not seem to be overly representative of such community and some of the entities expressing opposition do not appear to be very representative either, even within the sectors to which they are associated.

64. The level of recognized stature or weight among sources of opposition as expressed in the letters and material submitted by the Objector is also difficult to compare because the description of such sources and the information supplied is

not sufficiently detailed to draw a comparison. It is also quite evident that this situation makes it impossible for the Objector to provide evidence about the defense of the community in other contexts or to provide the description and costs of other channels used to convey opposition.

65. The Expert must turn now to the issue of whether the Application has in some way targeted the Objector's community. Under Article 3.5.4 of the Guidebook the criteria indicated to determine whether targeting has occurred includes statements contained in the application, other public statements by the applicant and associations by the public. On the assumption that such a community exists, the Objector must still prove "a strong association" between the gTLD string applied for and the community which it claims to represent.

66. While an association exists of course between the gTLD applied for and the term "tunes", this is by definition a generic term that might relate to tunes in general but not specifically to the "independent music community" the Objector claims to represent. The Applicant has explained that the Application does not refer to such a community at all nor are there other statements indicating a strong association or statements that might have triggered an association by the public of such targeting. The extremely broad definitions of tunes that the Applicant sets out in Annex 13 of its Response is enough to realize that none of those definitions lend themselves to establish a strong association with the community in the present case.

67. The last test on which the Expert must reach a determination is that concerning a likelihood of material detriment. The scope of the standard is quite precise on this matter. Two distinct kinds of damage are considered in Article 3.5.4 of the Guidebook, the first being the nature and extent of damage to the reputation of the community, and the second the nature and extent of concrete or economic damage to the community. In either kind of damage the Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. In addition said Article requires evidence that the Applicant does not intend to act in accordance with the interests of the community, that there will be interference with the core activities of the

community and dependence of such community on the DNS for its core activities. In the end the level of certainty that detrimental outcomes would occur has to be established.

68. The Objector has not proved the likelihood of either kind of damage occurring as a result of the eventual approval of the Application. The Expert does not consider that it is likely that the reputation of the community could in any way be affected by this Application nor is the reputation of A2IM or any of its members at issue. Whether there would be a likelihood of concrete or economic damage to the community caused by the Application were it to succeed has not been established either. While, as noted in paragraphs 22, 23 and 48 above, the Objector has indicated figures concerning the market participation that could be affected and some general estimate of the amounts potentially involved in damages, this does not appear to be related to the interests of a specific community which the Objector purports to represent but rather refers to the global market in general.

69. In essence the discussion concerns the question whether competition will be thwarted as the Objector believes, or not affected at all as the Applicant asserts. The Expert is mindful in this respect of the various institutional and scholarly opinions submitted to the effect that closed domains and unified registration, while entailing some restrictions, result rather in promoting online innovation and reduce the risk of abusive registrations. Opinions to the contrary submitted by the Objector are rather tenuous and do not address specifically some of the main issues underlying this discussion, in particular whether damage of some kind is likely to occur and competition affected as a result.

70. Whether there is market power abuse, support for pirate networks and anti-competitive behavior, as the Objector argues, is not something that can be established beforehand and is thus purely speculative. Should there be any such consequence competition regulators will very well know how to address this problem, certainly in the context of United States and European Union legislation which the Objector invokes. Any affected entity, including the Objector, would be able to request investigations in that event.

71. It is thus not possible to conclude that there is in this case a likelihood of concrete or economic damage to the community or that the Applicant intends to act contrary to the interests of such community or interfere with its activities. The dependence of the community on the DNS for its core activities has not been proven either as many other kinds of registration of second level domain names has not resulted in hampering those activities. In fact the Applicant explains that the use of, for example, "cars.com" has not resulted in any restriction of competition in that market, as neither has the use of "music.com", or "musician.com" (Applicant's Response, p. 14). (The Expert here again notes that references to "music" are made in the context of the argument concerning "tunes").

72. The Expert is directed to apply the very conclusions made explicit by the standards discussed, which are three in number:

> "If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail" (Article 3.5.4 of the Guidebook, "Community", *in fine*).
>
> "If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail" (Article 3.5.4 of the Guidebook, "Substantial opposition", *in fine*).
>
> If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail" (Article 3.5.4 of the Guidebook, "Detriment", *in fine*).

73. The Objection has not satisfied any of these requirements, which under Article 3.5.4 of the Guidebook are moreover cumulative. Even if the standing requirements would have been met, which is not the case, the Objection fails on the merits.

74. The Expert has no objection to the publication of this Determination in the ICC's webpage.

V. DECISION

For the above reasons and according to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)'s Objection is dismissed.

2. Applicant AMAZON EU S.À R.L. prevails.

3. AMAZON EU S.À R.L.'s advance payment on costs shall be refunded by the ICC International Centre for Expertise to AMAZON EU S.À R.L.

Date: 6 December 2013

Signature: _____

Professor Francisco Orrego Vicuña

Expert

ANNEX 2

How Music Community is Dependent on the DNS/Internet for Core Activities

According to the European Commission/JRC Technical Reports: "music is now shared and consumed on a much larger scale than before and consumers benefit from this. Music sharing over the internet enables artists to get wider reputations and consequently more opportunities for record sales and merchandising and also more live performances with larger audiences… Digitization and the internet have thus disrupted the role of major music companies and their relationship with consumers... They can now listen to music (downloaded to their own devices or through streaming services) on many different devices, anywhere and anytime.[1] Social networks are increasingly important for the marketing and sales of music." (Andra Leurdijk, Ottilie Nieuwenhuis, P.7)

The community's dependence on the DNS for its core activities is further highlighted by the continuing global growth of smartphones which have central features relating to music[2] and access to the DNS. By the end of 2011 there were 1 billion smartphones in use worldwide, a 46.6% increase over the previous year.[3] According to Worldwide Cellular User Forecasts, 2012-2017,[4] over the next 5 years the worldwide base of mobile subscriptions will rise to 8.9 billion with 4 out of 5 of these will be in developing countries. Now more than ever, the music community depends and is critically reliant on the Internet/DNS[5] for "distribution and promotion" of its primary activities,[6] such as communication (fan engagement, legal file sharing, social media and fan sharing, email lists, branding, reputation management), promotion (search engine optimization and marketing, pay per click, social media optimization and marketing, analytics, link exchanges, news),

[1] Andra Leurdijk, Ottilie Nieuwenhuis, European Commission, JRC Technical Reports, Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries. The Music Industry, http://ftp.jrc.es/EURdoc/JRC69816.pdf, 2012, P.6

[2] U.S Department of Commerce, http://selectusa.commerce.gov/industry-snapshots/creative-media-industry-united-states

[3] Mobithinking, http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/a#smartphonepenetration

[4] http://www.strategyanalytics.com/default.aspx?mod=pressreleaseviewer&a0=5335

[5] Ashraf El Gamal, The Evolution of the Music Industry in the Post-Internet Era http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1501&context=cmc_theses, 2012, P.67-68 and Eric de Fontenay, Impact of the Internet/New Media on the Music Recording Industry http://userpage.fu-berlin.de/%7Ejmueller/its/conf/torino99/abs/e_deFontenay.html

[6] Tunecore, http://blog.tunecore.com/2012/06/then-v-now-the-path-to-success-for-artists.html

distribution (official websites, blogs, social media profiles and media), and commerce (selling of digital downloads, merchandise, tickets, CDs and other products direct from their official website or web destinations, plus monetizing through web crowd-funding, web live streaming, online licensing and more).

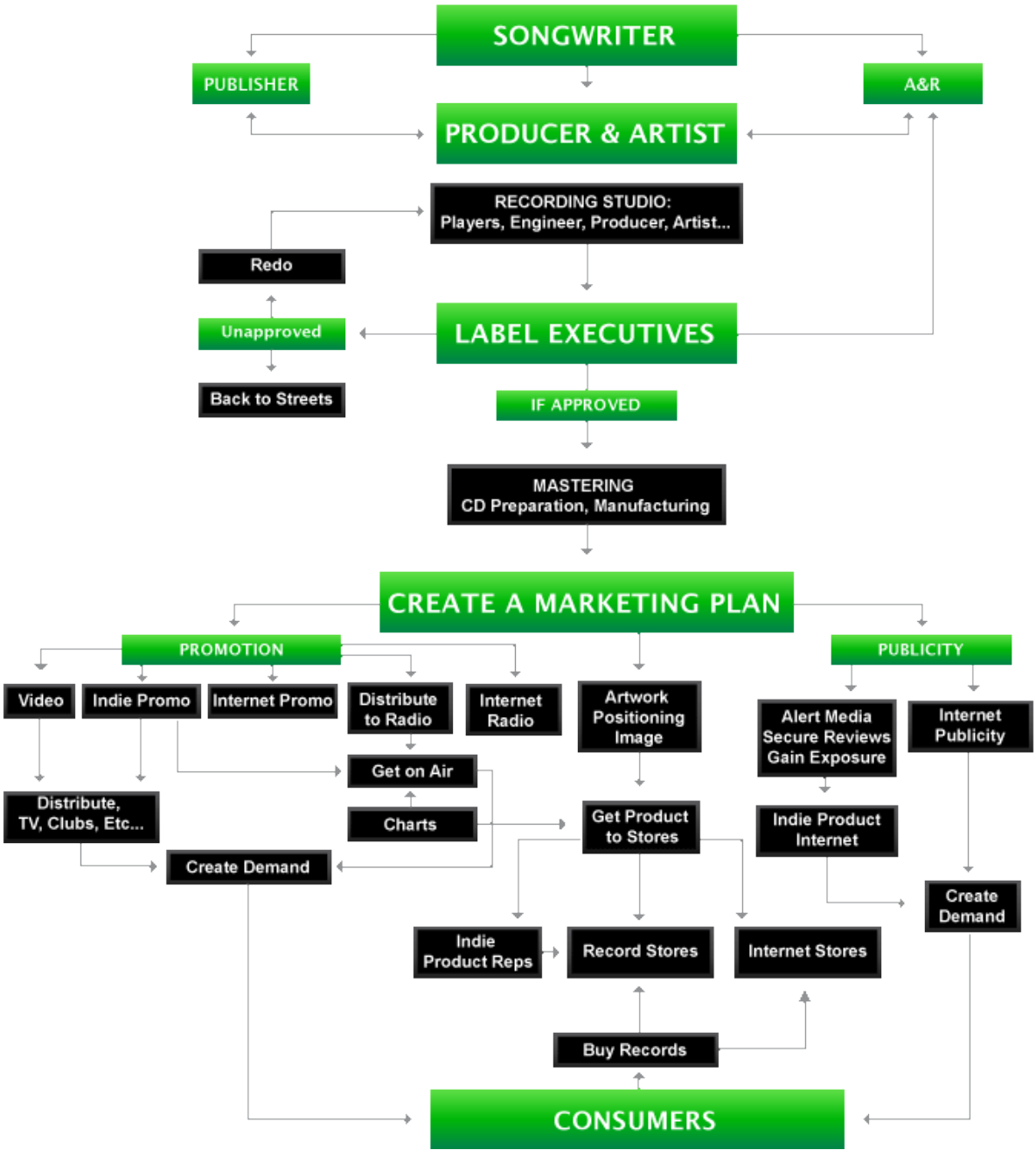
According to the European Commission/JRC Scientific and Policy Reports, the "digital shift – that is the digitization of information, the generalization of the Internet protocol, and the rapid take-up of these technologies (final user equipment, broadband infrastructures, etc.) has transformed the way we produce, store, distribute and consume goods and services. The Media and Content Industries (MCI) – which covers the music industry... have been first and heavily hit by the digital shift.[7]" On the distribution side, allowing companies like Amazon or Google to dominate in some segments raises concerns about an extension of this domination to other segments (emphasis added). (Jean Paul Simon and Marc Bogdanowicz, P.17)

The Additional Submission provided concrete evidence beyond reasonable doubt of the Objector's clear delineated community, strong association with the music community, its global scope, activities and membership diversity, size and breadth. The Additional Submission invalidated Amazon's misleading arguments with concrete evidence and commonly-known facts that the Objector(s) Members and Related Objector Entities represented more than just U.S Label interests and that the music community was reliant on the DNS for its core activities.

[7] Jean Paul Simon and Marc Bogdanowicz, European Commission, JRC Scientific and Policy Reports, http://ftp.jrc.es/EURdoc/JRC77932.pdf, P.4, 2012

Annex 3: How the music Community is clearly delineated and organized

As mentioned in Objection, the music community is clearly delineated and uses globally recognized strictly delineated systems for its activities. Typical operations for the creation, distribution and promotion of music is standard and strictly delineated in process are depicted in the diagram[8] below:



[8] NewArtist, http://newartist.com/img/ind_flow_chart.gif

Strictly delineated systems pertaining to music include:

i. North American Industry Classification System (NAICS) adopted in 1997 where Code 711130 relates to music groups and artists (See U.S Census, http://www.census.gov/epcd/ec97/def/711130.HTM)

ii. The United Nations' International Standard Industrial Classification (ISIC) adopted in 1948 where Code 5920 relates to music in the form of sound recording or music publishing activities (See United Nations, http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=27&Co=5920&Lg=1)

iii. The Dewey Decimal Classification (DDC) system adopted in 1876 used in over 200,000 libraries and in more than 135 countries where Code 760 relates to the class of "Music (See Worldwide Library Cooperative OCLC, http://oclc.org/dewey/resources/summaries.en.html)

iv. The Library of Congress Classification (LCC) system adopted in 1897 where code "M" relates to the class of "Music" (See Library of Congress, http://www.loc.gov/catdir/cpso/lcco/lcco_m.pdf)

The global music community uses clearly delineated systems to facilitate its common, unified interest in distributing and promoting music. Such strictly delineated music systems are used to standardize, identify and match music to individual Music Community rights holders to compensate them appropriately. Such organized, strictly-delineated systems that pre-date September 2007 and cover the entire music community and how music is consumed include:

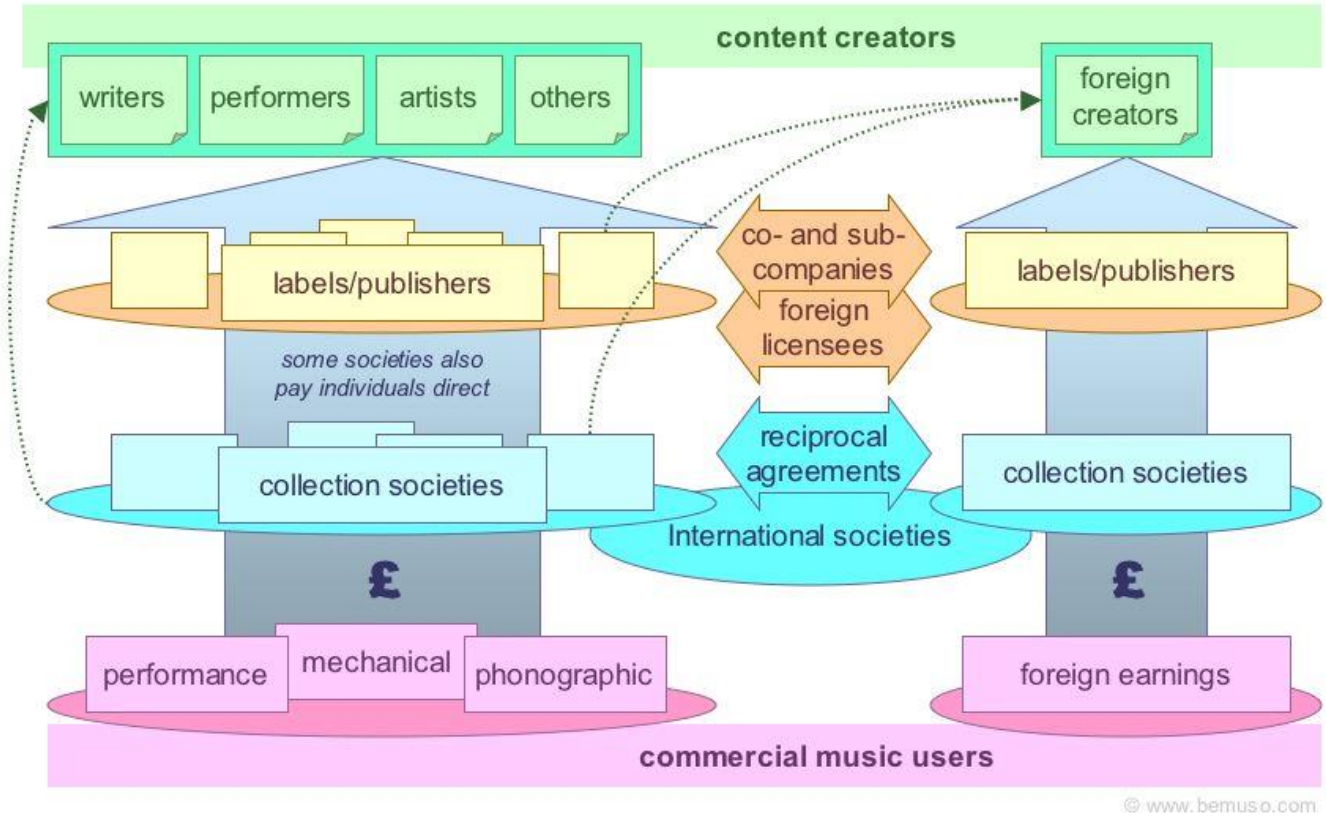
i. The International Standard Recording Code (ISRC) formed in 1986 for music sound and video recordings (See ISRC, http://www.usisrc.org/about/index.html)

ii. The International Standard Music Number (ISMN) formed in 1993 for printed music (See ISMN International, http://www.ismn-international.org/whatis.html)

iii. The International Standard Musical Work Code (ISWC) formed in 2001 for musical works (See ISWC International Agency, http://www.iswc.org/)

iv. The Global Release Identifier (GRid) System for digital music distribution (See International Federation of Phonographic Industry (IFPI), http://www.ifpi.org/content/section_resources/grid.html)

These delineated systems ensure that individual music is uniquely identified and attributed to individual members of the music community in a highly organized and structured manner including common, shared methods of royalty identification and allocation to compensate music community rights holders. Such music community systems are strictly delineated and organized with respect to the allocation of world music royalties as presented in the diagram[9] below:



Such clearly delineated, organized and globally-standardized music royalties[10] include:

i. Mechanical royalties
ii. Performance royalties
iii. Synchronization royalties
iv. Digital rights royalties
v. Print royalties
vi. Sales royalties
vii. Rental/public lending royalties

[9] NewArtist, http://newartist.com/img/ind_flow_chart.gif
[10] Alliance of Artists and Recording Companies AARC, http://www.mymusicroyalties.com/types

Furthermore governments are involved in this highly structured and delineated community to set statutory royalty rates. For example, in the United States, mechanical royalties are based on a "statutory rate" set by the U.S. Congress. This rate is increased to follow changes in the economy, usually based on the Consumer Price Index. Currently, the mechanical statutory rate is $0.091 for songs five minutes or less in length or $.0175 per minute for songs that are over five minutes long (Source: U.S Copyright Office, http://www.copyright.gov/carp/m200a.html).