

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/474/ICANN/91

INTERNATIONAL FEDERATION OF ARTS COUNCILS AND
CULTURE AGENCIES

(AUSTRALIA)

vs/

.MUSIC LLC

(USA)

This document is a copy 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.

gTLD opposed: .music

Nature of objection: Community

International Federation of Art Councils and Culture Agencies (Australia)

Objector

-v-

.music, LLC (USA)

Applicant

The Parties and their Representation

The Applicant: .Music, LLC of 179 Belle Forest Circle, Suite 104, Nashville, TN 37221, USA (js@farfurther.com) represented by Karen Bernstein of Law Offices of Karen J. Bernstein LLC, 200 Park Avenue, Suite 1700, New York, NY 10166, USA (kjb@karenbernsteinlaw.com).

The Objector: International Federation of Arts Councils and Culture Agencies (“IFACCA”) of 372 Elizabeth St., Surry Hills, Sydney, NSW 2010, Australia, (info@iffaca.org) represented by Jason Schaeffer of ESQwire.com P.C., 1908 Route 70 East Cherry Hill, NJ 08003, USA (jschaeffer@esqwire.com) and Constantinos Roussos, 950 S. Flower Street #1404, Los Angeles, CA 90015, USA (costa@music.us).

The Panel

The Rt. Hon. Professor Sir Robin Jacob of the Faculty of Laws, UCL, Endsleigh Gardens, London, WC1E 0EG, UK (rjacob@ucl.ac.uk), appointed on 19th June 2013, file transmitted to me on 18th July 2013 shortly after the estimated costs were paid.

EXPERT DETERMINATION

General Procedural matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (Application ID 1-959-51046). The Objection was lodged on 13th March 2013 and the Response on 15th May 2013.
2. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find

a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

3. On 28th May 2013 the Objector requested leave to file additional submissions, including its Reply to the Response in advance of the Panel selection. By emailed attached letter of 10th July 2013 the Applicant objected to the additional submission and asked me to deny its admission. By letter of 22nd July 2013 the Objector responded to the letter of 10th July 2013.

4. By my interim decision of 30th July 2013, (itself unpublished but they are also to be found in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77), I ruled that I had power to admit the additional submissions and decided to do so on the basis that the Applicant should have liberty to submit a “Sur-Reply”. The Applicant did so on 12th August 2013.

5. The normal 45 day deadline for an expert determination (Art. 21 of the Procedure) would have expired on 1st September 2013. However I requested the Centre for an extension of time for two reasons. First is that I was also seized of a number of other community objections to the .music string and the somewhat allied .band string. For the sake of consistency it was obviously desirable that the decisions in all cases were rendered at the same time and these other cases were slightly lagging the present case. Secondly, although this was a lesser consideration, the time for my determinations fell within the holiday period.

6. After I had submitted my draft decision to the ICC, by an email of 11th October 2013, the Objector sought to introduce yet further fresh evidence consisting of a statement of the Applicant published by ICANN on 9th October 2011. The Objector claimed this showed a material change from the original Application and was said to be contrary to and inconsistent with submissions it had made in these proceedings. The Applicant responded by an email of 12th October saying there was no change still less a material change and the Objector replied by an email of 10th October.

7. Since I had already concluded that the Objector lacked standing and none of this material touched that point, it was and is irrelevant to the outcome of these proceedings I would add this: that having examined the material, I think it is

irrelevant to any of the other issues. It does not amount to any change as to the Rules which I have to apply (see below as to these). It was about whether or not the Applicant would operate an exclusive access registry to which the answer was “no”. That may or may not be relevant to ICANN’s ultimate decision, but is not relevant to whether or not the Objector has standing or has made out the grounds for a community objection.

8. The Rules I have referred to are the Rules for Expertise of the ICC (“ICC Rules”), supplemented by the ICC Practice Note on the Administration of Cases (“ICC Practice Note”) under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (“Procedure”) of the gTLD Applicant Guidebook (“Guidebook”). I collectively call these “the Rules” but where appropriate will identify the particular rule concerned.

9. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

- (1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and
- (2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

The function of this Panel

10. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether the Applicant should be awarded the gTLD .music. My task is more limited: to decide whether the Objector concerned has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection will be successful. If they are not then it will fail. It will then be for other procedures within ICANN to determine what happens next. I am not concerned with these.

The Applicant

11. The applicant, .music LLC, is a US company incorporated in the State of Tennessee. Its parent company is called Far Further LLC. It has “partnered” with a company called Neustar Inc. which is an experienced TLD registry operator for the operation of its proposed .music registry. The application form indicates that Neustar is in a position to provide appropriate levels of security and the technical ability to achieve the applicant’s aims.

12. In its application .music LLC opens its description of its “Mission Purpose” as follows:

“The mission of .music is to collectively grow a domain that serves artists, songwriters and music professionals; promotes music and nurtures the art ... all for the love of music.”

More concretely the applicant says:

“Our goal is to work with members of the global music community to create a trusted, secure and restricted TLD for accredited members of the music community. The dotMusic Registry will provide qualifying registrants the opportunity to register their preferred domain name in a safe, reputable and globally accessible TLD. Registrants will be identified and validated as members of the music community through their existing and maintained membership in existing associations related to the creation and support of music.”

13. The general idea is that there should be a system of vetting applicants for a .music domain name. This would exclude IP infringers so that “The Internet user will know that they are dealing with a registrant that is identity-verified and compliant in their use and distribution of IP.” The aim is to create a domain name which will give users a “high expectation of trust and security.” The application form explains in general terms only how the vetting will work and what will happen if an abuse of the .music TLD is alleged. Largely the detail seems to be about trade mark infringement – rather less is said about copyright infringement though doubtless there is a proposed mechanism for dealing with an applicant for, or holder of, a .music address who is engaged in copyright infringement. So also for potential criminal activity such as child pornography.

14. For present purposes that is enough about the Applicant and its intentions – more detail can be found by referring to the open part of the Application on the ICANN website, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1388>.

15. The Applicant has a lot of support for its Application. This is evidenced by the bundles of letters forming Annexes 3 and 4 to the Response. True it is that some (but by no means all) of them are in common form. But the fact that the organisations concerned were prepared to provide support, and the fact that the organisations represent a range of different types of people interested in music (performers, composers, songwriters and record labels) shows it is a serious contender for .music.

The Objector

16. The Objector describes itself in the following way (I omit footnotes to the IFACCA website where a lot more about the Objector and its activities can be found):

“The International Federation of Arts Councils and Culture Agencies (IFACCA) is the global network of national arts funding agencies inaugurated in December 2000. Achievements since 2001 are described in IFACCA announcements and its anniversary publication First Five Years.

IFACCA is the worldwide network of national arts funding agencies dedicated to improving good practice in arts and cultural policy development, arts funding, audience development and public access to the arts such as music.

It aims to improve the capacity and effectiveness of government arts and music funding agencies to benefit society through networking, advocacy and research. Its Vision is “A world in which the arts are valued in themselves and for their contribution to strengthening communities and enriching lives.” Its Mission is “To improve the capacity and effectiveness of government arts funding agencies to benefit society through networking, advocacy and research.”

Objectives of the Federation are to:

- Support the leadership of government arts funding agencies with a well-informed, global perspective on issues affecting arts and cultural policy
- Consolidate the collective knowledge of government arts funding agencies
- Enhance cooperation and promote understanding between government arts funding agencies, and between them and other key international networks and organisations
- Promote the value of public investment in a diversity of arts and cultural practices
- Provide relevant, responsive and accountable services to members of the Federation

17. Thus the Objector is essentially, as it itself puts it in the Appendix to the Opposition, “the global network of arts councils and ministries of culture with national members from over 70 countries comprised of governments’ Ministries of Culture and Arts Councils covering all continents.” It also has links with other organisations such as UNESCO. Attention is drawn to a link with the International Association of Music Information Centres but it not clear what the significance of that is. Clearly IFACCA performs valuable work in helping its various members organise, get funding for and promote support for the arts. Its website gives a clear picture of these activities. None are directly related to the provision of art (in its widest sense including music) by IFACCA itself. It is not an art funder itself: its members do that.

Has the Objector got standing?

18. Of particular importance in relation to this question is that the Objector does not even purport to represent any of its members (still less any company or organisation with which it has a link) in relation to its Objection to the gTLD .music. On the contrary it explicitly states in the Appendix to its Objection:

Please note that while the dotMusic project has been given in-principle approval by the board of IFACCA, **it has not been endorsed by individual member organisations** (My emphasis).

19. It is not entirely clear what the “dotMusic project” is – IFACCA does not explain it as it could have done. The best inference is that it is for the IFACCA to support a rival applicant for .music. The Objection refers to “Other Related Entities”:

“DotMusic and Supporting Music Community Organisations (see Appendix A)” [There is no Appendix A but there is an Appendix H which I think must be the document referred to].

“DotMusic” appears to be the general name of this rival. Its moving spirit is Mr Constantinos Roussos, named as the Objector’s representative in this case. Such support would include eliminating a rival applicant. Thus pursuing this opposition must be part of the “dotMusic” project. Whether or not Mr Roussos or his companies are actually paying the IFACCA’s legal costs is not explicit – I note that the Applicant so asserts and it is not denied).

20. Whether IFACCA has standing must be judged by the Rules as they apply to the facts concerning IFACCA itself.

21. The Applicant argues against such standing. In summary its argument runs thus:

- (i) It accepts that the IFACCA is an “established institution”, having been founded in 2000 and been active ever since;
- (ii) But it is not “associated with a clearly delineated community,” namely the “music community” (assuming that there is such a thing).
- (iii) Nor does it have “an ongoing relationship with a clearly delineated community,” i.e. the music community.
- (iv) Its association is only with its members – the governmental arts bodies who form its members.

22. The Objector’s arguments in summary are:

- (i) There is a sufficient association between the IFACCA and the music community by reason of its association with its members;
- (ii) An association is also established another way, via DotMusic Limited’s membership of IFACCA.

23. Because of the Applicant’s concession that the IFACCA is an established institution, I need not consider this point further.

24. However the Applicant contends that the IFACCA does not have *an ongoing relationship with a “clearly delineated community”* within the meaning of the Rules (*specifically Rule 3.2.2.4 of the Guidebook*) It is not enough to have an ongoing relationship with a community of any sort – the relationship must be with *a significant portion of the community to which the gTLD string may be explicitly or implicitly be targeted*. I accept that construction of the Rules – it would make no sense for a party to have standing because it had a relationship with a community wholly unrelated to the string in question.

25. It follows that the IFACCA must prove an ongoing relationship with the music community (assuming for the moment that there is such a thing, a point itself in

contest). I do not think it has any such relationship. It is quite clear from the disclaimer referred to above that IFACCA has no representative capacity to act for others. Only its own relationships can count. These are only with its members and only in relation to the matters within its functions – essentially liaison and facilitation between government arts organisations. Some of these might have standing (I do not say do). But even if they did, the IFACCA cannot get its own standing by piggybacking from such members. It does not represent them in relation to this matter.

26. Still less do I consider it can gain standing because dotMusic Limited has become an associate member. Even if dotMusic Limited had standing (which I doubt not least because it is probably not an “established institution”), it is simply not the case that IFACCA represents it. As for the dotMusic Ltd.’s “Supporting Music Community Organizations”, they have no relationship whatever with the IFACCA. This is a hopeless attempt to piggyback on piggyback.

27. I have no hesitation in concluding that the IFACCA does not have standing to make this Objection as defined and required by the Rules. The Applicant therefore prevails.

Further Observations

28. That is enough to dispose of this case. Although I need not go on to consider whether the Objector has proved all four of the tests for a community objection I will do so because I am not satisfied that they are. In particular I hold that neither a *clearly delineated community* nor *substantial opposition within the community* are proved. Both of these are further, independent, reasons for rejecting this Objection.

29. Firstly there is the question of whether the community invoked by the Objector is “clearly delineated.” The Objector defines it this way:

The music community invoked is a strictly delineated, organized and culturally-based community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“COMMUNITY”), that relate to music: the art of combining sounds rhythmically, melodically or harmonically. “MUSIC” has no other significant meaning or name beyond the definition offered by popular dictionaries and encyclopaedias that define “MUSIC” as relating to “combining sounds rhythmically, melodically or harmonically (“UNIQUENESS”).” The music community corresponds to the

community relating to “the art of combining sounds rhythmically, melodically and harmonically” (“IDENTIFICATION”; “ASSOCIATION”). The Community is distinct and has a strong association with the applied for string since it encompasses sharing similar needs and attitudinal and behavioural patterns in relation to music-related activities, music production and its consumption. The “MUSIC” string matches the name of the Community and is the established name by which the Community is commonly known by others, such as the traditional media using phrases such as the “MUSIC” artists, “MUSIC” producers and “MUSIC” publishers to classify commonly known Music Community entity types (“NEXUS”; “ASSOCIATION”). Also the “MUSIC” string is commonly used in classification systems such as ISMN, ISRC, ISWC, ISNI and Dewey. For example, the Dewey Decimal Classification system, published in 1876 (“LONGEVITY”; “PRE-EXISTING”; “ASSOCIATION”), has code 780 relating to “MUSIC”.

30. This cloud of words does not convey to me anything which can fairly be described as a clearly delineated community. Who is within it and who without? What is the test? Almost everyone (save perhaps the completely deaf or tone deaf – and even Beethoven became deaf)) appreciates music of one sort or another. Many make it, from chanting monks to West Indian calypso bands. Others write it – from advanced polyphonic music to dance music. But that does not put them all into the same box. The same generic word covers all music. But a common generic word does not itself evidence anything which can fairly be called a “community” even in the widest sense of that word. There is no public recognition of a music community locally or globally, there are no formal or informal boundaries around the supposed “community.”

31. Next there is the question of whether there is substantial opposition within the community. If the community is all who are interested in music (making, listening, commercially exploiting and so on), then those who express support for the Objector are a tiny proportion of that community – because the community is effectively humankind. But even if one considers just those whom the Objector claims to represent, no substantial opposition is demonstrated. Only a few of its 70 members have supported this Objection. On any basis substantial opposition is not proved.

Costs

32. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as

determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

33. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The International Federation of Art Councils and Culture Agencies' Objection is dismissed and the Applicant, .Music, LLC, prevails.
2. The Applicant, .Music, LLC, is entitled to a refund of its advance payment of costs by the ICC pursuant to Art. 14(e) of the Procedure.

Date: ...18th.. Feb 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A
The Applicable Rules for Community Objections
gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

“An established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

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.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

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:

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

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.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

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. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

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.

The objector must meet all four tests in the standard for the objection to prevail.