Minds + Machines Comments on ICANN's Draft Applicant Guidebook, Version 4

Following are the comments of Minds + Machines on DAGv4. As always, we appreciate the opportunity to be heard.

We believe that the largest source of concern is not the DAG itself, or any provision in it, but rather any further delay of the launch of the new gTLD program. In our view, delay will erode the credibility of the new gTLD program and harm the many communities and businesses that are eager to participate. We therefore urge the ICANN to take into account the comments made by the community during this comment period, and having done so, to produce a final Applicant Guidebook.

Overall, we believe that the Guidebook is in very good shape, and reflects a hard-won compromise between the different points of view on how the program should be set up and administered. We will therefore confine our comments to a few areas of concern, and to offer suggestions for solutions where appropriate.

Explicit Ban on Trademark Front-Running
At the ICANN public forum in Brussels, I asked if the DAG had explicit language confirming that a trademark for a top-level domain (in other words, a trademark on "dot TLD") would not confer any advantage to an applicant. ICANN Vice-President Kurt Pritz replied that he thought such a prohibition was already included:

>>KURT PRITZ: There is a fairly specific clause in the guidebook that says that those -- even if registered as trademarks, those wouldn't be honored as trademarks in the launch process. Did I say that right, Amy?

>> ANTONY VAN COUVERING: I would love to see that. I haven't seen it pointed out. Thank you.

>>KURT PRITZ: Okay. I will look it up. I will look it up.

(http://brussels38.icann.org/meetings/brussels2010/transcript-new-gtld-program-update-21jun10-en.txt)

To date, we have not received any confirmation that this provision exists, and we have not been able to find it ourselves.

We believe that it is vitally important that the application period not be muddied, sullied, scammed or gamed by those using trademarks to obstruct valid applications. While "dot tld" trademarks are not granted by the U.S. Patent and Trademark Office, they are available in other jurisdictions, to the detriment of all applicants.

We suggest that the DAG specifically prohibit any advantage to holders of such trademarks. We also hope to receive assurances from ICANN that not only will such

TLD-specific trademark be denied any priority in an application, but that they will not be considered a valid ground for objection.

Reduced Pricing for Bundled Variants
Many applicants face a dilemma because their name is written and spelled in different ways. While for some the name of the TLD is a choice, for others it is not.

Geographical names, for instance, are pre-existing. These communities are not free to choose the name of their TLDs. Many of them have more than one common name, including IDN variants. For instance, consider these city names, with three distinct names and spellings:

- Koeln – Köln – Cologne
- Muenchen - München - Munich

Charging $185,000 for each of these variants seems punitive and unfair. We encourage ICANN to provide for a lower pormanteau fee in the case where TLD names are not chosen, but pre-existing.

Morality and Public Order
Early on, I identified the morality and public order module as flawed and defective (see http://www.namesatwork.com/blog/2008/10/30/icanns-morality-memo). Now the GAC has also found the module to be wanting, and has wielded their unofficial veto, preventing it – and by extension the entire gTLD program – from going forward. It should not surprise anyone that the GAC failed to propose an alternative, because a top-level domain is global, whereas morality is not. While this means that theoretical solutions may be difficult, practical ones may nonetheless be possible.

To date the GAC, and GAC members individually, have not participated in the multi-stakeholder working group set up immediately after the Brussels meeting to seek a solution to this issue, despite complaints from GAC members about not being included in policy issues in their formative stages:

Said the GAC representative from New Zealand:

"[O]ne of the issues that's coming out of the Joint Working Group, as I understand it, is the need for GAC influence on early parts of the policy development process and that that has not been -- that's been perceived as being something of a failure.

"Now, an example where early involvement has worked supremely well is in the case of the fast-track IDNs, where there's very, very close working relationship between the ccNSO and the GAC, and it's worked brilliantly well. And an area where it's tended to break down has been in terms of the generic -- the new generic top-level domains, where it has not worked so well.

"So it's in that context this has got to be looked at. It's not really a matter of changing balance. It's a matter of ensuring that the GAC is involved at an early stage in policy development, which leads to much better outcomes. And that's really the -- the point that's being made, I think."

(http://brussels38.icann.org/meetings/brussels2010/transcript-gac-board-meeting-22jun10-en.txt)

This sentiment was echoed by several other GAC members, including the outgoing and incoming GAC Chairs.

The Morality and Public Order issue threatens to be the major stumbling block to a successful and timely initiation of the new gTLD program. We encourage the GAC, and we ask the ICANN Board to encourage the GAC, to participate in this or a similar multi-stakeholder group to find a solution.

Financial Continuity
An overriding theme of the Applicant Guidebook is the protection of registrants. We applaud this focus.

The DAG envisions protecting registrants is by requiring prospective registries to supply a financial instrument that will guarantee at least three years of operation of essential registry services in the event of the business failure. An attachment to Module 2 of the DAGv4 entitled "Evaluation Questions and Criteria" provides extra evaluation points for an instrument showing "financial continuity."

Evaluation Question 50 identifies the registry services that require continuity:

   i) DNS resolution for registered domain names;
   ii) Operation of the Shared Registration System;
   iii) Provision of Whois service;
   iv) Registry data escrow deposits; and
   v) Maintenance of a properly signed zone in accordance with DNSSEC requirements.

The financial requirement is a unnecessary drain on the resources of prospective registries, which have already been damaged by the long delay of the new gTLD program. The goal of protecting registrants can, however, be achieved by different means.

The continuity of essential registry services can be assured through co-operative agreements between registries and/or registry service providers, who agree to provide these services to the failed registry.

This sort of arrangement has already been contemplated by ICANN in its Registry Transition Process document. This arrangement should be extended to the application evaluation portion of the DAG. Instead of an expensive and unnecessary financial

guarantee, applicants should be able to guarantee registry continuity and protection of registrants through co-operative agreements with other providers of registry services.

The currently contemplated financial guarantees are especially punitive for small registries and will tie up important resources. We believe this requirement will discourage deserving applications and contribute to the failure of others. We strongly encourage ICANN to provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part.

Intellectual Property Protections
We have already seen a form letter signed by several brand owners claiming that the intellectual property provisions in the Applicant Guidebook are insufficient. We expect a last-minute flurry of similar comments from brand owners and the trade associations that represent them.

We disagree. The protections described in the DAG4 are the result of significant work and input from the community. The core of these protections were drafted by representatives of the intellectual property community themselves, who made up the vast majority of the Implementation Recommendation Team (IRT). Even though the IRT's recommendations were not accepted in their entirety, the intellectual property protections embodied in DAG4 are a significant concession to trademark owners and represent a spirit of compromise on the part of other members of the ICANN community.

Every interest group within the ICANN community has found that they need to live with something that is, from their point of view, less than perfect. We believe that the intellectual property community should be no exception, especially considering the considerable concessions already made to them.

Level Playing Field
One constant during the slow evolution of the Applicant Guidebook has been the special pleading by various potential applicants, insisting on privileged treatment. Some have claimed that the duration of their clamor should privilege them; others point to alleged vast numbers of supporters; some claim that their type of application should be given priority. Wisely, ICANN has resisted these pleas. We support a single application window, a single set of rules, and no special priority to any type of application beyond those already contemplated by the DAG.

In conclusion, we again thank ICANN for the opportunity to participate.

Sincerely,

Antony Van Couvering
CEO, Minds + Machines