



October 5, 2009

Dear Sirs,

**WIPO Center Submission on Inter-Registrar Transfer Policy Part B Policy Development Process – UDRP Consideration**

The World Intellectual Property Organization Arbitration and Mediation Center (the WIPO Center) submits the following comments:

The WIPO Center welcomes this initiative in general terms, and submits that consideration should also be given to implications for the Uniform Domain Name Dispute Resolution Policy (UDRP).

In particular, the WIPO Center notes that while the current provisions of the Inter-Registrar Transfer Policy would appear to prohibit transfers from one registrar to another during the pendency of UDRP proceedings, the WIPO Center has observed multiple instances of difficulties or misunderstandings which have arisen in the context of UDRP proceedings in part from differing registrar interpretations of ICANN's existing policies.<sup>1</sup>

The WIPO Center strongly suggests consideration be given within this Policy Development Process to the following matters in the interest of effective administration of UDRP proceedings so that the UDRP system remains as a viable and time efficient alternative to court options.<sup>2</sup>

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Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601  
United States of America

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<sup>1</sup> In addition to the Inter-Registrar Transfer Policy, reference is made here to other relevant provisions which appear to set out responsibilities and obligations to ICANN-accredited registrars within the UDRP context, such as ICANN Expired Domain Deletion Policy (para 3.7.5.7), UDRP Policy (paras. 3 and 8), and ICANN Registrar Accreditation Agreement (para 3.7.7.11).

<sup>2</sup> The WIPO Center draws ICANN's attention here also to its comments submitted in the ongoing Policy Development Process on Post-Expiration Domain Name Recovery, and to the effects these two processes may have on the UDRP.

1. Prohibiting Inter-Registrar Transfers of domain names subject to UDRP proceedings

Currently the Inter-Registrar Transfer Policy, under Section 3, “Obligations of the Registrar of Record” is formulated in a manner which seems to permit instead of require a Registrar of Record to deny a request for an Inter-Registrar Transfer by a Gaining Registrar:

“The Registrar of Record *may deny a transfer* request only in the following specific instances:

1. [...]
2. *UDRP action” (emphasis added)*

While such discretion may be appropriate in certain circumstances outside of the UDRP context, in cases where a domain name is subject to a UDRP proceeding, a Registrar of Record should be obligated to deny a transfer request and void or cancel such request if the requisite consent was given inadvertently.

Such a requirement to cancel or void an Inter-Registrar Transfer request for a domain name subject to a UDRP proceeding would be especially useful in light of the default option contemplated in the current Policy, which allows for a transfer in the event that the Registrar of Record does not reply to the transfer request forwarded by the Registry, i.e.:

“Failure by the Registrar of Record to respond within five (5) calendar days to a notification from the Registry regarding a transfer request will result in a default ‘approval’ of the transfer.”

This may allow space for improper conduct by registrants trying to frustrate and avoid UDRP proceedings, resulting in “cyberflight”. An obligatory provision requiring the Gaining Registrar and the Registrar of Record to cancel such a default approval would be appropriate and in line with existing ICANN policies.

The WIPO Center would suggest that consideration be given to the inclusion of such safeguard provisions in the Policy. Consideration should also be given to clearly obligating the registrars to deny or cancel any transfer of a disputed domain name to another registrar during the pendency of a UDRP proceeding until its conclusion, e.g., the implementation of any transfer (or cancellation) decision has taken place.

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## 2. Locking of domain names subject to UDRP proceedings

Secondly, the WIPO Center would support the inclusion of provisions strengthening the requirement that domain names subject to UDRP proceedings must be locked by the Registrar of Record for the pendency of a UDRP proceeding and until such time that implementation of any transfer (or cancellation) decision has taken place.<sup>3</sup>

This is suggested so as to provide clear guidance to registrars concerning their obligation to lock disputed domain names subject to UDRP proceedings. While the WIPO Center notes that in general ICANN-accredited registrars do appear to appropriately lock domain names subject to UDRP proceedings, there have been instances where such a locking has not taken place, or has been inexplicably removed prior to a UDRP proceeding being resolved. This not only causes attendant complexities to the administration of such UDRP proceedings, but especially were such lock removal occurs after a proceeding has been formally commenced or decided, can result in significant inconvenience and time and cost incurred by a filing rights holder under the UDRP.

## 3. Mechanism to cure inappropriate transfers during UDRP proceedings

Thirdly, the WIPO Center would support any provisions requiring ICANN-accredited registrars to have an obligation to cure any inappropriately effected transfers which have taken place during a UDRP proceeding and which are, for example, in violation of a registrant obligation under paragraph 8 of the UDRP Policy. Meaning that, in such cases, such a transfer would, e.g., either be cancelled and the domain name returned to the Registrar of Record or that the Gaining Registrar would at least be obligated to implement any transfer (cancellation) decision issued by an independent UDRP panel.

Yours sincerely,

WIPO Arbitration and Mediation Center

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<sup>3</sup> The exception to such locking being a UDRP Provider-notified suspension of the administrative proceeding for the purpose of implementing a transfer agreement between the parties, as per current practice endorsed by ICANN.