

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

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<b>In the Matter of</b>	)	
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<b>Strategic Plan for Recordation of Documents</b>	)	<b>Docket No. 2014-1</b>
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The National Music Publishers’ Association (“NMPA”) and its wholly owned subsidiary, The Harry Fox Agency, Inc. (“HFA”), respectfully submit these Comments pursuant to the Copyright Office’s (“Office”) Notice of Inquiry and Request for Comments regarding Reengineering of Recordation of Documents. 79 Fed. Reg. 2696 (January 15, 2014) (the “Notice”).

**NMPA and HFA’s Interest in this Proceeding**

NMPA, founded in 1917, is the principal trade association representing music publishers and songwriters in the United States. As such, NMPA works to protect the interests of music publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 3,000 members, NMPA represents both large and small music publishers throughout the United States.

HFA is the wholly-owned subsidiary of the NMPA and is one of the nation’s leading providers of licensing, royalty calculation and royalty distribution services for the music industry. HFA is well known as an agent for tens of thousands of music publishing clients and self-published songwriters. In this role, HFA issues licenses and collects and distributes royalties for the use of copyrighted musical compositions. More recently, HFA’s licensing and

administration services have expanded beyond audio-only digital and physical mechanical uses to include the licensing and administration of the digital exploitation of lyrics, tablature, audiovisual uses, ringtones, digital background music services and more.

While HFA continues to manage its 87-year-old business, HFA has developed an additional service business under its Slingshot brand. Slingshot is a suite of copyright, licensing, royalty distribution, technology and consulting services offered to users of copyrighted musical compositions and is designed to facilitate the administration of any type of intellectual property rights. Depending upon each customer's needs, HFA's Slingshot services handle a portion or all of the end-to-end licensing process, from preparation of a licensing agreement, data matching and copyright research services through to licensing, royalty reporting and royalty distribution. HFA's Slingshot services also administer direct licensing agreements among publishers and digital music service providers whether or not the publishers are represented by HFA and whether or not the license agreements between the parties are blanket catalog licenses or require issuing track-by-track licenses.

In support of these Slingshot administration services and our publisher clients, HFA continuously enhances its database of sound recording and publishing information. This data, complemented by dynamic business and payment rules, establishes the foundation upon which HFA's copyright management services are built. HFA is also a founding member of the Digital Data Exchange ("DDEX"), an international organization whose fundamental mission is to develop communication standards to support the distribution of digital content.<sup>1</sup>

HFA's existing rights administration solutions in conjunction with its suite of Slingshot services have placed HFA at the fulcrum of the ever-changing music distribution landscape and are dependent upon an accurate database and efficient exchanges of information with its

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<sup>1</sup>See <http://www.ddex.net/>.

publishers and innovative music users. As a result, HFA, along with the NMPA, is interested in participating in the Office's discussion regarding technological upgrades to its recordation function and believes it is well-situated to contribute to such a discussion. This comment, therefore, is intended to provide input based both on HFA's experience and the experience of our publishers.

## **PERSPECTIVES REGARDING IMPROVING THE QUALITY OF COPYRIGHT DATA**

### **I. Introduction**

NMPA, HFA and many other participants in the music business have recognized for years that improvements in the ability to access data and information about the owners of music, to track the usage of music and to accurately pay the owners of that music, will pave the way for a robust and successful digital music marketplace. Users of music have generally sought a one-stop shop (or a handful of large shops) where they can obtain guaranteed, universal, up-to-date information regarding every song currently within copyright protection and license efficiently every such song. Music publishers, on the other hand, expect that each distribution of a recording will be tracked and that they will be paid properly. Fortunately, ever evolving technology and a focus on improving the quality and exchange of music data has enabled the detailed tracking of digital uses of music, the accuracy of which improves on a daily basis. The initial step in this process is for an administrator of any existing or new database of songs, such as HFA, to ingest and manage, on a daily basis, song catalog additions, including ownership claims and disputes, business rules for usage and rules regarding payment, such as letters of direction, information about estates and heirs, and, of course, government levies and garnishments. Like the Copyright Office, HFA and other administrators seek to reduce cost and processing time, limit the friction and inconvenience experienced by individuals and businesses

submitting information, all while improving the accuracy of the data ingested and facilitating the exchange of the information resident in their databases. HFA is analyzing, experimenting with and attempting to improve its data ingestion processes every day.

## **II. Methodologies for Submitting Documents and Information Are Intertwined with an Effective Data Models or Schema**

A number of methodologies can be employed to both increase accuracy and reduce overhead for processing and recording documents. Use of a combination of the following types of tools, for example, could improve the Office's current processes:

- a. web-delivered solutions employing secure HTML Forms to capture, validate and store data,
- b. .pdf/electronic documents,
- c. optical Character Recognition ("OCR") with standardized templates for data extraction (often called "OCR to Data"), and
- d. structured electronic documents.

These input tools will necessarily be layered on a data model or "schema" sufficiently abstracted to accommodate a range of inputs. As the Notice and related Office inquiries suggest, such a data schema must allow for the storage and cataloging of all potential recordation materials with room for alternative and edge case data and, for each record submitted, will link to a referenced document repository. This document repository could also be available to submitters to store or annotate their submission with anything that is not part of the standard "who," "what," "when," and "why," thus adding to the information available for indexing. The process of designing the data model or schema should enable the Office to create lists of potential values that could be provided as drop-down or standardized values, or integrated as part of a "wizard" that walks a recipient through the submission process. The goal, of course, is to reduce the inaccuracies inherent in freely-typed data entry.

The Office also suggests additional goal-oriented design concerns. For example, should the recordation database be designed to link with registration records and/or private databases of works under copyright and/or employ standard identifiers to allow high volume users to easily access and query the data? The answers to these questions influence both the types of information sought from the remitter and the structure of the data schema.

Once a proper schema is created, new data can be uploaded through the tools selected by the Office and, as the necessary resources become available, information from the archives could be ingested. Much of the following discussion addresses our experience with ingesting and updating information regarding musical works and extrapolating how that experience might translate to the Copyright Office's document recordation function. These comments do not address the conversion of existing data and documents in detail, but experience suggests that to do so accurately will probably require the use of a combination human review and tools like OCR.

### **III. HFA's Experience with Publisher Affiliates Submitting Documents and Information**

HFA represents music publishers and self-published songwriters who control anywhere from millions of songs to a single song. These publishers, therefore, range from extremely sophisticated corporations with significant IT resources to individual songwriters working from a desktop computer. As a result, HFA operates systems for acquiring song data intended to encourage a wide range of users to regularly provide actionable data regarding their musical compositions. HFA has found that a three-tiered process allows it to obtain the best, actionable information regarding musical compositions in a timely fashion from a variety of song owners.

The structure is as follows:

**Tier 1:** A web-based application for transmitting data through a guided process.

**Tier 2:** Bulk registration via an MS Excel<sup>®</sup>-based template.

**Tier 3:** Use of industry standard electronic bulk data delivery; in this case using Common Works Registration (CWR) files to transmit musical composition data.

HFA's tiered approach corresponds with the models regarding which the Office is seeking comment.

#### **IV. Guided Remitter Responsibility Model**

HFA uses a web-based application to obtain information from its affiliated publishers who are unlikely to require bulk submission of song information. HFA and NMPA would recommend such a web-based guided remitter model to the Office in order to encourage individuals and small organizations to record relevant documents with the Office. The Office may find some of the following features useful when designing its web-based submission application:

1. Regular evaluation and updating of data values that can be provided as drop-down options or integrated into a "wizard" where predictive models suggest inaccuracies are likely to occur.
2. Password-protected user/remitter accounts that pre-populate basic identifying information submitted to the Office and allow for electronic signature when and if required.
3. Provide an electronic acknowledgement to the remitter confirming the accurate ingestion of data and allowing the remitter to correct inaccuracies identified after reviewing the acknowledgement.
4. Match submissions to existing records based on standard identifiers such as the International Standard Recording Code<sup>2</sup> (ISRC) for sound recordings, International Standard Work Code<sup>3</sup> (ISWC) for musical compositions and fuzzy matching logic on text strings (e.g. song title, composer name) to prompt the remitter to identify links, suggest corrections to the submitted data based on related data entries or notify the Office and remitter of conflicts.

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<sup>2</sup>See <https://www.usisrc.org/>.

<sup>3</sup>See <http://www.iswc.org/>.

The goal of the above features is to encourage and enable users to improve the accuracy of their submissions. They are based on the recognition that the manual entry of data is inherently imperfect, but that the creators or owners of copyrighted works have both the most information and the most accurate information at hand. Triggering review and thought by such users will increase the accuracy and, therefore, usefulness, of the Office's database of recorded documents.

In addition to the manual entry of data into a web-based application, some version of bulk submission would seem appropriate. HFA's Tier 2 and Tier 3 submission processes are two variants of a bulk submission process. In the first case, HFA obtains song information by providing an MS Excel<sup>®</sup>-based template to publishers. They can submit large numbers of songs and the related data using a form in which HFA has simply pre-defined the information to be included in each column as it relates to a single item per row. This is a very common process and publishers with midsized catalogs seem to have limited difficulty in using the form. HFA's Tier 3 process uses the publishing industry standard Common Works Registration (CWR) files to transmit musical composition data. Although the Office could implement or adopt a similar process, it is likely that a relatively simple template that can be uploaded in connection with the recordation of a document would be sufficient. Of course, the wider variety of file types or formats that are accepted, the less friction will be experienced by remitters.

## **V. The Use of Structured Electronic Documents**

As the Notice states, many agencies and businesses that process data use structured electronic documents in which tagged indexing or cataloging information is built into the document itself. In the music industry, however, structured electronic documents are not widely adopted and we, therefore, have limited experience with them. If the Office's goal is to supplement manual entry of data and the uploading of documents with a more automated

submission process, that process would be web based with real-time validation of formatting and the like in order to “future-proof” the effort. Application Programmer Interfaces (APIs) are a growing methodology to interact directly with defined data sets, such as the Copyright Office’s database, through the Web and one the HFA finds itself relying upon more frequently.

Although not specifically identified as an issue in the Notice, it seems appropriate that some consideration be given during the database and submission tools design process to the development of APIs so that businesses, academics and others can interface with the data and documents maintained by the Office directly. Certain submission processes and data schema may facilitate the development of APIs more than others. Moreover, allowing API access to the database would enable the proliferation of the copyright-related information and enhance the value of the Office to the public while promoting the benefits of registration and recordation

## **VI. The Linking of Recordation Records to Registration Records**

NMPA and HFA support the linking of recordation records and registration records. As Circular 12 states, “The Copyright Office serves as an office of public record of [copyright] transfers.”<sup>4</sup> Indeed, the Copyright Act confers certain legal advantages on those who record documents. Recordation of a document gives constructive notice of the facts stated in the recorded document and, in the case of a recorded transfer, priority over a conflicting transfer. However, such constructive notice is only available if the relevant work has been registered and the recorded document itself, or the associated registration materials, identify the work to which it pertains such that a reasonable search under the title or registration number of the work of an index maintained by the Copyright Office would reveal the documents.<sup>5</sup> Similarly, a nonexclusive license prevails over a conflicting transfer of copyright ownership if it meets

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<sup>4</sup> Circular 12 at 3, available at: <http://www.copyright.gov/circs/circ12.pdf>.

<sup>5</sup> 17 U.S.C. §205(c) and (d).



certain requirements and the license was taken before execution of the transfer or the license was taken in good faith before recordation of the transfer.<sup>6</sup> Linking registration records to document records enhances the public record function established under these provisions as the registration number serves as a unique identifier of a work under copyright, making the information easier to locate.

Requiring document remitters to provide registration numbers in a standardized format for all the registered works to which the document pertains, however, does not seem appropriate under the statute or, at a minimum, with respect to works that were registered prior to implementation of such a requirement. Section 205(c)(1) clearly contemplates that the benefits conferred under Sections 205(c) and (d) be available as long as a reasonable search by title of any index maintained by the Copyright Office would reveal the recorded document. Constructive notice of facts and priority of transfer are available if “the [recorded] document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work.” In addition, Section 205(e) of the Copyright Act does not include the reasonable search requirement of Section 205(c) and (d). Requiring submission of registration numbers for all registered works pertaining to a recorded document, would undercut the ability of a party who has recorded a transfer to argue that a reasonable title search would have located the relevant document, thus supporting constructive notice of facts or priority of a transfer.

A more practical problem arises when considering the impact of such a regulation on companies that purchase mid-sized to large catalogs of copyrighted works. Music publishing acquisitions are a good example. Music publishers commonly transfer catalogs containing

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<sup>6</sup> 17 U.S.C. §205(e).

thousands or even tens of thousands of musical compositions. These catalogs have compositions dating back decades. Although the file related to the composition or songwriter (probably paper) usually contains the registration number and frequently the certificate of registration, such compositions are often identified by title and songwriter in the indexes maintained by the owners or administrators. The registration number is frequently not included.

When such a catalog is purchased, it is common for due diligence to be performed on the top earning titles, but a title-by-title review of every compositions in the catalog is cost prohibitive for even the highest priced transactions. The amount of work and expense required to find all registration numbers related to a catalog transfer of older music would be similar to requiring due diligence with respect to every title in the purchased catalog and, therefore, unreasonably expensive as well. To the extent a reasonable search by title is sufficient to provide notice under the Section 205 of the Copyright Act, the available benefits will continue to be an incentive for copyright owners to identify the copyrighted works associated with a recorded document. With a streamlined submission process, remitters are likely to include additional metadata, including the registration number for newer works, on a regular basis.

## **VII. Use of Standard Identifiers and Other Metadata Standards**

Wherever possible, the Copyright Office should encourage the use of unique identifiers for classifying assets, whether that identifier is the registration number or an industry standard code. Unique identifiers would allow users to easily identify works under copyright and related documents. They also would make it easier to update documents and registrations over time. Ultimately, the easier it is locate a work, establish chain of title and identify a current copyright holder's contact information, the more useful the Office's registration and recordation functions will be. Such a database would help facilitate licensing and the purchase of copyright, possibly

making it more than a repository for publicly recorded documents and, instead, an essential resource for copyright-based industries.

However, standard identifiers must be validated and cannot be the sole basis for matching or linking records. HFA relies upon the International Standard Recording Code (ISRC), for example, in linking sound recording records to musical compositions. HFA has found it necessary to validate ISRCs assigned to recordings with at least one, and typically more, data points using fuzzy logic matching because of incorrect associations resulting from bad data input. HFA, therefore, would recommend that standard identifiers used in automated processes by the Office require validation from at least one other data point to avoid incorrect associations. Similarly, the use of widely adopted metadata standards could improve the accuracy and usefulness of the Office's recordation function. As noted above, HFA uses CWR files to communicate music publishing information and is a founding member of DDEX, an international organization whose fundamental mission is to develop communication standards to support the distribution of digital content. Such standards have been adopted by many of the larger participants in the music industry and, therefore, could be useful for the bulk submission records relating to transfers of copyright and similar documents, but as discussed above, may not be necessary at this time.

All of this being said, we recommend that every transaction that is executed with the Office be assigned a unique identifier that will aid with the identification of records.

**ADDITIONAL STATUTORY INCENTIVES TO RECORD DOCUMENTS  
PERTAINING TO COPYRIGHT WOULD LIKELY COMPROMISE THE UNITED  
STATES' OBLIGATIONS UNDER THE BERNE CONVENTION**

The Copyright Act of 1976 recognizes that the rights of owners vest in the authors of new works upon creation, and that such rights are deserving of protection as property, which

enjoyment includes the ability to transfer ownership.<sup>7</sup> The statutory provisions of 17 U.S.C. §§201 and 205 also comport with U.S. commitments under the Berne Convention, which requires that our laws protect an author’s “enjoyment and exercise” of his rights without imposing formalities.<sup>8</sup> As such, any requirement that owners adhere to specific formalities in the recordation of transfers would violate both codified U.S. copyright policy and the protections secured under U.S. law under Berne.

To impose declaratory or other formalities, particularly under the threat of stripping authors of their vested rights, is to re-impose the types of owner-discriminatory and onerous duties present in the 1909 U.S. Copyright Act, duties that were flatly rejected by the 1976 Act.<sup>9</sup> Such an imposition would undermine the exercise and enjoyment of rights defended by Berne at a time when copyright owners face unprecedented challenges in protecting their rights against the proliferation of copyright violations through digital technology and the Internet.<sup>10</sup> Similarly, imposing veiled punishments on owners for failing to file voluntary or mandatory recordation of transfers, such as denying statutory damages and attorneys’ fees, would impose barriers against owners’ vested interests, and create a situation in which copyright owners possess a right with no effective remedy.<sup>11</sup>

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<sup>7</sup> 17 U.S.C. § 201(a) (2012) (vesting initial copyright in the authors of new work); 17 U.S.C. §201(d) (2012) (noting that transfer of copyright passes the copyright as “personal property”); 17 U.S.C. § 302(a) (2012) (“copyright in a work . . . subsists from its creation”).

<sup>8</sup> Berne Convention for the Protection of Literary and Artistic Works art. 5(2), as amended Sept. 28, 1979 [hereinafter Berne Convention].

<sup>9</sup> Christopher Bussafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 Cornell L. Rev. 1, 39 (noting that the 1976 Act removed “mandatory” formalities of the law to comport with international expectations, such as Berne’s ban on formalities in Article 5(2)).

<sup>10</sup> See MARK HELPRIN, DIGITAL BARBARISM: A WRITER’S MANIFESTO 37-38 (2009) (discussing the emergence of illegal music, book, and DVD copying and that within the realm of books alone the American Association of Publishers finds “. . . 30,000 to 125,000 pirated files every week.”).

<sup>11</sup> Jane C. Ginsburg, “*With Untired Spirits and Formal Constancy*”: *Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. (forthcoming 2014), at \*11-12, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2262924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262924) (“ . . . given the high costs of litigation and the difficulty (and cost) of proving actual damages, a copyright claimant cannot as a practical matter *effectively* enforce

Although some argue that recordation merely imposes a duty without impacting an owner's ability to "exercise" enumerated rights under the Act, such arguments miss the larger point of both Berne and U.S. law: to protect the vested rights of those who labor in the creation of literary and cultural works.<sup>12</sup> Where Berne and U.S. law impose "formal" duties, they currently do so to protect, not strip, copyright owners' rights.<sup>13</sup> In keeping with the longstanding policy goal of securing rather than denying rights to owners, NMPA believes any duties created under a revised Copyright Act are rightfully placed on the users of copyrighted works. Users, not owners, should bear the burdens of properly documenting and filing to obtain permission to exploit copyrighted works, as well as the costs of suits brought against those who fail to comport their conduct with those duties.

### **IMPLEMENTING FORMAL REGISTRATION REQUIREMENTS WOULD BE INAPPROPRIATE**

The Copyright Office continues to consider suggestions first raised formally in its 2005 notice, which provided several possible solutions to address the orphan works issue, including a "Formal Approach" of requiring affirmative registration by copyright owners to maintain their copyrights past a certain age — an approach NMPA has already asserted to be inconsistent with current copyright law, the explicit goals of the 1976 Act and CTEA, and obligations under Berne.<sup>14</sup>

As with requiring recordation by owners, a formal approach to registration unfairly flips the current copyright regulatory scheme from an opt-out to an opt-in system, effectively

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her rights in the United States without the prospect of statutory damages and attorney's fees . . . a right cannot be "exercised" if it cannot be enforced.").

<sup>12</sup> *Id.* at \*22 (describing Berne-compatible formalities as "author-protective constraints" meant to protect the "author as the weaker party" in most contractual settings).

<sup>13</sup> *See, e.g.*, STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW (2011).

<sup>14</sup> National Music Publishers' Association, COMMENTS, IN THE MATTER OF ORPHAN WORKS (690), at 7-8 (Mar. 25, 2005), available at <http://www.copyright.gov/orphan/comments/OW0690-NMPA-HFA.pdf>; *see also* Berne Convention, *supra* note 8, art. 5(2).

reversing Congress' abolition of the copyright renewal requirements in 1976.<sup>15</sup> It also adopts certain formalities that are inconsistent with Congress' abolition of formalities in the 1909 Act.<sup>16</sup>

In addition, formal registration requirements would necessarily, and unfairly, result in the loss of rights or remedies for copyright owners who may be prejudiced by their own inexperience and inadvertence — one of the very reasons underlying Congress' rejection of such formalities in adopting the 1976 Act.<sup>17</sup>

### CONCLUSION

Barriers that inhibit the successful launch and operation of new businesses based on the exploitation of copyrighted works should be removed in order to provide consumers with access to the best, most creative works our writers and artists can provide. Such businesses will take a variety of often unpredictable forms, but they will always require that users and creators of copyrighted works partner to provide robust data collection, data exchange, matching and, ultimately, accurate royalty payment. At the core of this process is the efficient registration and recordation of copyrights and information related to such copyrights. We, therefore, hope our comments and proposals assist with the reinvestment in the Office's technology to support the creative businesses for which the U.S. is famous worldwide.

Respectfully Submitted,



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<sup>15</sup> See Orphan Works, 70 Fed. Reg. 3,739, 3,741 (2005).

<sup>16</sup> See PAUL GOLDSTEIN, COPYRIGHT § 4.9 (2d. ed. 2005); 3-9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02-9.05 (2004).

<sup>17</sup> NIMMER, *supra* note 16, at §9.02 (explaining that, in deliberating the 1976 Act, Congress noted, “One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work [and can be] the cause of inadvertent and unjust loss of copyright.”) (citation omitted).

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