Comments on the Copyright Office's request concerning Technological Upgrades to Registration and Recordation Functions

Submitted by Robert G. Colton, former Section Head, Documents Recordation Section and Senior Subject Matter Expert, U.S. Copyright Office, now retired from Federal service.

In her recent David Nelson Lecture, Maria A. Pallante, the Register of Copyrights asks "Why is the recordation function stuck in time?" And In the Federal Register Notice "Technological Upgrades to Registration and Recordation Functions, it is stated "Notably, the Office's recordation services were included in the initial reengineering plan, but were later dropped for budgetary reasons. Recordation processes are, thus, still paper-based and are a top concern of the Copyright Office."

The principal reason the recordation function is stuck in time was stated by Mary Beth Peters, Register of Copyrights, in a meeting on reengineering recordation in 2003: "Basically we have ignored recordation for the past 25 years." She was referring to the years from the effective date of the 1976 Act to 2003. An accurate statement of the current status of recordation is: the only difference today is that we are now at 35 years from 1978. In other words, the senior management of the Copyright Office starting with the Register of Copyrights has been unwilling to fix document recordation. The reengineering of recordation services was not merely dropped for budgetary reasons. In fact, a system was developed and was about to be implemented by senior management, despite numerous warnings from recordation staff that the system did not work. Senior management finally realized that the Copyright Technology Office and its contractors had developed a system that was incomplete and more labor intensive than the old system. This system would did not provide online filing of documents. The changes in the statute and regulations needed for online filing had not been requested from Congress by the Copyright Office. Unfortunately, some senior officials of the Copyright Office still did not realize that there was no online filing system for documents.

Since 2007 when the Copyright Office began to implement its online registration system, it has devoted all of its resources for reengineering to fixing the online registration function while also adding registration staff. The Documents Recordation Section staff, in contrast, was reduced by one third. In addition, the processing of Online Service Provider notices was added to the workload of the Documents Recordation Section. The system used for Online Service Providers was hastily developed in 1998 for the law establishing these filings. This temporary system was to last for 6 months but is still the only system available 15 years later.

And finally, the recordation function is stuck in time due to the Office's inability and/or unwillingness to provide some basic guides to those filing documents. While there is a very basic section on "How to record a document," on the Copyright Office website and a circular, there is no similar section on notices of termination. Authors struggle with the difficulties presented by notices of termination which are very important to their rights. Yet, the Office has failed to provide a section on the website or a circular to assist those the Copyright Office is supposed to serve even though notices of termination have been filed since 1978.

Before seeking comment on issues such as integrating data with outside databases, the Office should decide what it will recommend to Congress on what recordation should be.

The Register in her lecture quoted Professor Alan Latman's thoughts from a 1958 revision study:

> The key to an effective recording system is its completeness, and ideally all links in a chain of title should be placed on record. In the absence of a basic copyright registry system, identifying the work, the first owner of the copyright, the date from which the term is computed, and other pertinent information, the recording of transfers would often fail to identify the work covered by the transfer, the term of the copyright, and especially the derivation of the transferee's claim to ownership. On the other hand, it may be contended that it is asking too much of an assignee not only to record his own assignment but also to register the initial claim and to record any intervening assignments.

The current statute and regulations allow almost any document pertaining to copyright to be recorded. Thus, the document may or may not identify works being transferred or licensed. About 10 years ago a music publisher having purchased a catalog of 800,000 musical works, chose to record a blanket transfer which did not identify any works rather than pay a fee of $1,000,000.00+ (it would be a much higher fee today) to record a document identifying the works.

If the goal is to have a complete record of chains of title of works, then the law would need to require that the document identify all of the works being transferred or licensed and that each subsequent owner make sure all of the previous documents in the title chain had been recorded.

The Register suggests having downstream owners register their interests in the work(s) and then record the document. This seems to be redundant and unnecessary since under a new system, the document should be required to identify the work(s) and the parties to it. Currently, the Office will record documents where the works and/or the assignee are not identified. Documents involving transfers and licensing of works protected by copyright are contracts governed by state law. How can federal law be changed to encourage or require documents to be drafted in a way that will include the information the Office wants in the public record without interfering with state laws?

Security interests present another challenge. Banks and other lenders want to know if there are any other loans or liens outstanding on copyrights presented as collateral for a loan, a common practice in the music and motion picture industries. Under the Uniform Commercial Code, documents in commercial transactions can be indexed by date and debtor within in a day or two and made public within that time frame. For copyrights such a filing does not identify both of the parties to the transaction much less the works being used as collateral. Since the Peregrine case, which ruled that security interests in copyrights could only be perfected by recording them in the Copyright Office, there has been a substantial increase in the number of security interests being recorded in the Copyright Office. How can this problem be resolved? Prior studies on this topic and proposed legislation 15 years ago went nowhere.

Capturing data from online filings of documents, if such a system is ever developed, is the only way the Copyright Office can present a reasonably current record of copyright ownership. Under current law, the document is the legal record of the transaction. How will the Office verify the information? Outside databases are not under the control of the Copyright Office. How could the Office ensure the integrity of the public record? Some filers want the Office to enter all of the information pertaining to each work in addition to the titles. For example, authors, edition, date

of creation, date of publication, copyright registration numbers and date of registration, and prior recordation information. How could the Office verify such information submitted by filers?

The Copyright Office says it has met with stakeholders in the document recordation process. Unfortunately, the Office has not made the information from these meetings or even a summary of the information gathered public. Presumably, responses to this notice of inquiry would be more relevant if this information had been provided.

The Patent and Trademark Office has had an online filing system for documents since the 1990's. Why is the Copyright Office so far behind?

The Copyright Office says that document recordation is a top concern. One surely hopes so. It should be noted that document recordation as a top concern has been stated many times in the past with nothing being done to improve the recordation function. Other Office priorities have always overridden documents. Hopefully, this promised effort will not be yet again what is known in the Virginia General Assembly as the "Shad Treatment"—picking a subject to death and then passing it by indefinitely.