Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of: Changes to Recordation Practices	Docket No. 2014-04

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") is pleased to have the opportunity to provide these comments in response to the Copyright Office's July 16, 2014, Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. *See* 79 Fed. Reg. 41470 (July 16, 2014). These comments supplement the written comments filed by the RIAA on March 14, 2014, in response to the Office's January 15, 2014, Notice of Inquiry ("NOI") In the Matter of: Strategic Plan for Recordation of Documents, 79 Fed. Reg. 2696 (Jan. 15, 2014), Docket No. 2014-1, and the oral comments of the RIAA at the subsequent Roundtables on March 25, 26, and 28, 2014.

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In connection with their business, RIAA's members have registered many thousands of copyrights and also regularly record documents pertaining to copyrights.

The Copyright Office Catalog is a valuable national resource. As such, the RIAA supports the Office's efforts to develop modern, electronic processes to record documents pertaining to copyrights in the Catalog. We support steps that would increase the efficiency of recordation of copyright documents and of searching for those documents while allowing for more reasonable recordation fees, as long as the steps are voluntary, do not impose unnecessary burdens on remitters who wish to avail themselves of those procedures, and do not have the risk of potentially imposing negative consequences on remitters for inadvertent errors. Any rule promulgated by the Office should encourage remitters to utilize new electronic recordation procedures, but should not impose penalties that would serve as a disincentive to using those updated procedures.

1. Forms.

The RIAA supports the Office's proposal to allow a remitter voluntarily to complete and include a Recordation Document Cover Sheet (Form DCS) with its submissions, and in allowing the Form DCS to satisfy the sworn certification requirement of 17 U.S.C. 205(a). The RIAA has no objection to the Office requiring the filing of a Form DCS should the remitter seek a return receipt as provided for in subsection (f) of the Proposed Rule.

2. Electronic Submissions of Title Appendices.

The RIAA commends the Office for its proposal to allow filing of electronic lists of 100 of more titles. We agree that this should relieve the Office of some of the burden of cataloging recordations of copyright documents involving large numbers of titles and expedite the processing of such documents. In addition, we agree with the Office that such electronic submissions should be voluntary.

The RIAA has no objection to the format proposed by the Office for the voluntary submission of electronic lists. We also commend the Office for proposing to make the submission of copyright registration numbers voluntary for the reasons set forth in RIAA's March 14, 2014, Comments to the NOI, and its oral comments at the subsequent Roundtables.

In addition, we suggest that the Office implement a process of quality control checks, particularly during the first year or so after a final rule is promulgated, so that the Office can determine the extent of errors in the submissions of electronic lists. If the rate of such errors is not insignificant, the Office may need to consider modifying the rule in order to minimize such errors.

Potential Negative Consequences

Unfortunately, the current proposal runs the risk of disincentivizing remitters to use the electronic list option because the proposal as currently drafted, perhaps inadvertently, has the potential to punish rights holders who make innocent, inadvertent mistakes in preparing electronic lists in the specified format that are submitted for recordation by suggesting that the electronic lists may take precedence over the underlying original document that is submitted for recordation. We oppose any wording that could conceivably be interpreted in a manner that could have substantial and unfair negative effects on rights holders, rather than encouraging rights holders to utilize the electronic list option.

For these reasons, should the Proposed Rule be enacted in its current form, it would improperly subvert the plain language of the Copyright Act and the intent of Congress. It also runs the risk of depriving remitters of their right to constructive notice by potentially having an electronic list take precedence over the original underlying recorded document, even if the facts in the original document are different, a result Congress clearly did not intend. Moreover, in rare

circumstances, the risk could extend beyond the unwitting loss of constructive notice of titles inadvertently left off an electronic list of titles. Indeed, when read with 17 U.S.C. § 205(d), the proposed language creates the risk that under certain rare sets of facts, a remitter who inadvertently omitted one or more titles from an electronic list could lose all ownership of one or more of those works. It is respectfully submitted that the Office cannot change the intent of Congress, and the express language of a statute enacted by Congress, through a rulemaking. *See, e.g.*, 17 U.S.C. § 702.

This is not to say that electronic versions of lists of works that appear in the true document submitted by the remitter should not be used to assist the Office in indexing those titles in the Catalog. Indeed, such electronic lists will, in the great majority of instances, serve the salutary purpose of assisting the Office in the efficient cataloging of the information contained in the lists. However, these electronic summaries should not be considered "documents" for the purposes of 17 U.S.C. § 205(c), such that they would have superior, legally binding effect should they inadvertently be inconsistent with the actual document that is recorded with the Office. To do otherwise would, as explained more fully below, subvert the intent of Congress, and constitute unwise policy in general.

Proposed Solution

The RIAA proposes that subsection (c)(4)(iii) of the Proposed Rule be modified by striking all of the language of that subsection after the following: "The Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences, *if any*, of any inaccuracies in the electronic list in relation to the recorded document." There is no need for the Office to pre-determine for the purposes of promulgating regulations whether any legal consequences might result from the submission of an electronic list containing errors or what such consequences could or should be.[1] The effects of any such error should be determined on a case-by-case basis with reference to the specific facts in evidence in an appropriate legal forum.

Legal Support For Our Position

The law has always recognized the operative legally binding document as ultimately being the actual transfer/assignment/security document, not some secondary source or summary. The original document does and should constitute the ultimate repository of the facts that are contained in that document, whether for the purposes of constructive notice or otherwise. This is recognized by the best evidence rule, as codified in the Federal Rules of Evidence. For example,

[1] This would be consistent with existing Office policy. For example, Section 1603 of the Compendium II of Copyright Office Practices ("Compendium II") provides that "[t]he Copyright Office will not attempt to judge the legal sufficiency or interpret the substantive contents of a purported transfer or other document."

Federal Rule of Evidence 1002 provides, "An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."

Along these lines, Federal Rule of Evidence 1001(d) provides that an "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — *if it accurately reflects the information.*" (Emphasis added.) Thus, if an electronic list submitted to the Office contains errors, it by definition would not "accurately reflect[] the information," and would not be considered an "original" for the purposes of the best evidence rule.

Further, Federal Rule of Evidence 1003 provides, "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity *or the circumstances make it unfair to admit the duplicate.*" (Emphasis added.) We submit that an electronic list is analogous to a "duplicate" and that it would be unfair to rely on, or give precedence to, an electronic list containing errors.

Subsection (c)(4) of the Proposed Rule itself recognizes this concept when it provides that, "The electronic list(s) shall *not* be considered part of the recorded document and shall function *only as a means to index* titles and other information associated with the recorded document." (Emphasis added.) This is appropriate, as it recognizes that the underlying, original document is the legally operative source should there be a conflict or question about the facts contained in that document. However, the Proposed Rule then contains contradictory language in subsection (c)(4)(iii), which provides that the remitter presumptively bears the consequences of inaccurate electronic title lists with respect to constructive notice under Section 205(c). This subsection of the Proposed Rule further provides that the electronic list – which the Proposed Rule earlier correctly recognizes is *not* to be considered a part of the recorded document – nevertheless controls in instances of inconsistencies between that the list and the underlying document. As a consequence, the Proposed Rule is internally contradictory. For that and the other reasons set forth in these Comments, the RIAA strongly suggests that the Proposed Rule should neither state nor imply that the electronic list be given precedence over the underlying, original document for the purposes of constructive notice.

It is appropriate that, if a title is not in the voluntary electronic list but is in the original document, the original document controls, as the proposed rule recognizes in subsection (c)(4). It is not appropriate, however, also to say that omitting a title from the electronic list, *even if the title appears in the paper document*, may affect the ability of the remitter to claim constructive notice of the facts contained in the actual underlying document. The underlying document – which is best evidence of its contents – must control in both instances.

This interpretation is also necessitated by the interplay of Sections 204 and 205 of the Copyright Act. Section 204(a) provides that a transfer "is not valid unless an instrument of conveyance . . .

is in writing and signed by the owner of the rights[.]" Section 205(a) states that a transfer may be recorded in the Office "if the document filed for recordation bears the actual signature of the person who executed it" or is accompanied by a certification. Section 205(b) allows the Register to record "the document." The document to which this language refers is the instrument of conveyance. This is a clear recognition of the primacy of the original document over any electronic summary of that document. Finally, the constructive notice provision in Section 205(c) refers only to "the document," which is the original document recorded with the Office, *not* any type of electronic title list that is not explicitly provided for by the statute.

Moreover, the proposed regulation in its current form would work against the goal the Office desires to advance in this proceeding (and the related proceeding Docket No. 2014-1) by acting as a disincentive to remitters to submit electronic lists. Once remitters recognize that they could be subject to harsh consequences that could deprive them of very valuable rights simply through an inadvertent error in submitting information in an electronic list, they will be reluctant to avail themselves of that option.

Process for Easy Correction of Errors

Finally, regardless of whether the Office accepts the RIAA's strong suggestion to modify the proposed rule in the manner set forth above, the Office should also provide for a mechanism or procedure by which a remitter can easily correct any errors to the electronic list that the remitter has supplied voluntarily.[2] Thus, for example, if a remitter discovers that it provided an electronic list that contained errors, the remitter should be able to correct those errors in a simple, cost-free or low-cost manner. Further, there should be no time limitation during which a remitter can correct an error. However, the remitter should expect to bear the consequence, if any, for the time period during which the electronic list contained erroneous information.

3. <u>Return Receipt.</u>

The RIAA supports providing the proposed mechanism to enable a remitter to receive a return receipt from the Office for a recorded document. This will be beneficial to remitters.

[2] It appears that the Office may already have certain such mechanisms in place under the current recordation process. For example, Section 1505.02 of Compendium II provides that a remitter may correct errors in a document discovered following recordation by, among other things, recording "an affidavit or other signed statement describing the error in the previously recorded instrument." The RIAA suggests that the Office allow for the correction of errors in electronic lists by this or a similar method as well, and that there be at most a nominal fee for the recordation of such a corrective affidavit. In addition, the Office should publicize more explicitly the existence of corrective mechanisms so that remitters can take advantage of them.

Conclusion

The RIAA generally supports the Proposed Rule, but believes a few modifications are in order. Most importantly, we urge the Office to delete everything in subsection (c)(4)(iii) of the Proposed Rule after the following: "The Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences, *if any*, of any inaccuracies in the electronic list in relation to the recorded document." We also encourage the Office to implement quality control checks to ensure that the electronic list option, if implement, is working as intended, and to provide a mechanism or procedure by which a remitter can easily correct any errors to the electronic list that the remitter has supplied voluntarily.

Dated: August 15, 2014

Recording Industry Association of America, Inc.

/s/ George M. Borkowski
George M. Borkowski
Senior Vice President, Litigation and Legal Affairs

/s/ Susan B. Chertkof
Susan B. Chertkof
Senior Vice President, Business and Legal Affairs