

**Before the
U.S. Copyright Office**

In the Matter of)	
Request for Comments)	Docket No. 2014-1
on Strategic Plan for Recordation of Documents)	Submitted March 14, 2014
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Comments of the Motion Picture Association of America (MPAA)

The Motion Picture Association of America (“MPAA”) is pleased to provide these comments to the Copyright Office in response to the Federal Register Notice (FRN) on a Strategic Plan for Recordation of Documents appearing at 79 Fed. Reg. 2,696 (Jan. 15, 2014).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The MPAA members are large-volume clients of the U.S. Copyright Office registration and recordation system, and also rely heavily on the Office’s hard-copy public records and online database. As such, we appreciate the Copyright Office’s attention to improvements in the current recordation system for our members, and also for the general public who use or rely on the Copyright Office registration and recordation systems and the database.

Our companies have worked on registrations and recordations in good cooperation with the staff of the Copyright Office for decades, and we have considerable experience with the Office’s practices and processing of our filings. The MPAA members record a wide variety of documents with the Copyright Office for a wide variety of legal reasons, including long and short-form assignments, licenses, corporate name changes, liens, mortgages and other agreements and documents necessary for the business of financing, producing and/or distributing feature films, television and new media.

As the FRN notes: “[m]odernizing and improving the recordation services is a top concern of the Copyright Office” – and the MPAA appreciates the Office’s focus on this issue. Given our long-standing relationships with the Copyright Office, we will continue to work cooperatively with the Office and share our considerable experiences on recording documents and accessing the hard-copy and online databases, as the Office considers proposed changes and improvements to recordation practices (as well as on the upcoming proposals on registration practices). We hope – and we are certain that the Copyright Office shares this hope – that the goal of any re-engineering of the recordation system is to improve the system and the database to allow the recordation system to run more efficiently and effectively for all users of the Office’s

services with interests in licensing, using or otherwise exploiting copyrighted works, including those in the entertainment business. Re-engineering recordation services is important for MPAA members in connection with both the creation and dissemination of new works and the distribution of existing film libraries. In sum, a re-engineered document recordation system is important for all authors, copyright owners, licensors and licensees, as well as users of copyrighted material.

Relatedly, a more robust and searchable, publicly accessible database maintained by the Copyright Office also will help support both the creation and dissemination of copyrighted works in the private sector, including the ability to facilitate licensing, and other uses of works. The database can be improved not only by inputting more accurate information, but also by expanding the volume and nature of the information in the system, and by enhancing the access and searchability of the database for all public users. Moreover, because of its universal benefits, improving the Copyright Office's database and recordation system should provoke little controversy, but rather garner widespread support among both rightsholders and users of copyrighted material.

MPAA Recommended Improvements to the Current Copyright Office Recordation System

The FRN requests "suggestions for improvement" to the current system. MPAA agrees with the Copyright Office that the following improvements (many of these set out in the FRN) should be part of any new recordation system:

1. Significantly reduce the processing time of recordations, and get information into the Copyright Office online database more quickly.

As the Copyright Office notes, the current pendency time diminishes the value of the Office's recordation function to both remitters and users of the database. Getting materials recorded and into the database faster is important for all users of copyrighted materials, including MPAA members.

2. Improve the accuracy of the data entered into the database, including the cataloging entry of information on the documents.

As the FRN notes, the current system (dating to the late 1800s) involves hand-entering data, which results in numerous errors in the names, titles, registration numbers and other information in documents submitted for recordation. A more accurate database is in the interest of all rightsholders and users.

3. Improve the functions and searchability of the Copyright Office's online database.

This recommendation encompasses improvements to allow for the ease of identification of the work or works to which a recorded document pertains, and any of the relevant parties otherwise already in the Copyright Office database, such as the name of all relevant authors, copyright owners and claimants. This would also include the ability to link that information to copyright registration information, including registration numbers, authors, owners, claimants and the like.

According to the FRN, fewer than half of the works mentioned in recorded documents since 1978 are identified by a Copyright Office registration number. The ability to link to registration data would be helpful. As the Copyright Office notes, there are currently no links to registrations in large part because recorded documents do not have a standard format for the inclusion of registration information. It would be helpful to standardize the format of Copyright Office registration numbers. But the Office should take care not to merge the proposed standardization of registration information formats with making the inclusion of registration information a requirement for all recorded documents. The latter would be unduly burdensome in the case of recordations referencing many works and would not be feasible in a number of circumstances, including when recording documents pertaining to foreign works or owners, for works in progress, or for acquisitions of large libraries of copyrighted materials.

To illustrate the burden spoken of above, it is common for copyright owners, such as studios, to purchase or sell particular rights (such as acquiring U.S. distribution rights) for an entire library of films numbering hundreds or thousands of titles. To have to register and await the issuance of a Copyright Office registration number for each title in the transaction, many of which may not have been previously registered, and to input all of those registration numbers into all of the transactional documents to be recorded, would be very burdensome.

To further illustrate the feasibility point, for foreign materials, it is common for MPAA members to license underlying rights (such as story rights, or musical compositions, recordings or photographs and artwork to be incorporated in film or television materials) or to license U.S. (or other territorial) film distribution rights of foreign films or television programs. For these transactions involving works created or first authored or owned abroad, recording documents is a regular business practice for an MPAA member, but in most instances, because a U.S. copyright registration is not required pursuant to international treaties, there is no U.S. Copyright Office registration number because a copyright registration was never made for the work. 17 U.S.C. § 411.

Similarly, for works in progress, it is often necessary to record documents even before the work is completed, much less registered. The same is true for works for which a registration is pending at the Copyright Office, so that there is no registration number at the time of recording crucial documents in the recordation system. This is a common practice in the film and television industries for works in progress given the long gestation period for the completion of works, which can take years from inception. Thus, the absence of a registration should not preclude rightsholders from recording documents and their rights in the Copyright Office recordation system, and indeed, a registration number requirement would serve as a disincentive to record in certain circumstances.

There is no objection from MPAA members to the Copyright Office's suggestion about requiring the use of a registration number in a standardized format for all recorded documents so long as the option to allow documents to be recorded without a copyright registration number remains available. When a registration number is voluntarily included, as the Copyright Office notes, the identification of documents will be significantly improved. Titles alone are not helpful identifiers because the titles of copyrighted works are not unique. Whether or not a registration number is included in a recorded document, identification in the Office database should rely on the other information in documents, including the parties' names, relevant dates, and the titles of

the works included in the documents. It would also be a significant improvement to the system to be able to link to other recorded documents, for example, to improve chain of title searches, and to help with other common business practices.

4. Allow electronic document submissions, but do not require them.

This recommendation is to replace the current system requiring remittance of only paper documents for recordation with one that also permits electronic submissions. But, it should be the remitter's choice in any re-engineered recordation system to file either paper or electronic document submissions. MPAA recommends that the Copyright Office should not, at this time, require electronic-only submissions.

Further, the system should allow for copies, including scanned copies that include facsimile signatures (and not actual "wet" signatures). However, it would not be feasible to require e-signatures. In the current practices of film or TV production, it would be extremely time consuming and costly to get such e-signatures from the multiple parties involved in the myriad film and television transactions.

The system of allowing copies of documents should proceed while simultaneously maintaining the integrity of the recordation system and the data entered into the system. The recordation of complete originals or copies of pertinent documents, with certifications (under penalty for fraudulent mis-representations) of the recording party, that the copy of the document is complete and accurate, should be maintained.

5. Redacting information from recorded documents.

Whether submitted as paper or electronic documents, an issue of particular concern is the treatment of proprietary financial or personal information in documents, and the omission (redacting) of this information at the time of recording documents with the Copyright Office. Current Office practice permits the redacting of proprietary financial information in recorded documents. MPAA recommends that additional information should also be permitted to be redacted for privacy or other legitimate purposes. Such information could include, but is not limited to, Social Security numbers, dates of birth, and other personal or privacy-related or highly confidential or sensitive data. MPAA recommends that flexibility on this issue is preferable and that all such redactions should be accepted by the Office.

6. Linking the Copyright Office and private databases.

The FRN seeks comments on improving the links between the Copyright Office database and private databases. While doing so would improve the availability of information on copyrighted materials, and the MPAA would encourage discussions with the Copyright Office and other rightsholders on this topic, this is a complex issue that should not be rushed. Also, the MPAA assumes the term "linking" is meant to refer to the adoption of standardized formats and mechanisms for the secure exchange of data with the recordation system, and not a persistent hard coded connection for each studio's proprietary database.

MPAA recommends that consideration of such private-public database linking be treated on a parallel track to any of the immediate improvements in the recordation system (noted

above), so that the very complicated technical and legal issues relating to linking public and private databases do not slow down the roll-out or re-engineering of any new recordation system. Any linking of such systems, when it does occur, should result from purely voluntary cooperation of private parties, who should be under no obligation to share their data, especially proprietary data, with the public. The same would be true in helping to establish (voluntary) common identifiers for copyrighted works and metadata standards within private databases and the Copyright Office database. These are very good suggestions by the Copyright Office, that will require intensive public and private cooperative discussions, but the ultimate solutions and proposals should be voluntary, not mandatory.

MPAA Concerns About Proposed Recordation Changes

1. Current statutory incentives to record are sufficient.

The FRN requested public comments on the “sufficiency of statutory incentives to record transactions.”

In our view, federal and state laws, contracts and business practices already provide sufficient incentives to encourage recordations. No additional incentives are needed.

The current copyright statutory incentives include those found in section 205(c) (recordation as constructive notice), section 205(d) (priority between conflicting transfers), and section 205(e) (priority between conflicting transfer of ownership and nonexclusive license). These incentives encourage large volumes of recordations, including by MPAA members, and those recordings populate the Copyright Office database for the benefit of not only the recording parties, but also users of the database. These current incentives should not be altered.

2. Response to academic proposals for mandatory recordations.

MPAA opposes any of the “academic commentator” proposals set out in the FRN, which would require recordations for: (i) standing to sue; (ii) eligibility for essential and effective remedies, including statutory damages and/or attorney’s fees; or (iii) the validity of an actual transfer. These proposals would not improve the recordation system, are bad public policy, and are unworkable in practice.

While conditioning standing or remedies on recordation is a bad idea for the reasons noted below, conditioning *transfer validity* upon recordation is a truly dangerous proposal. Such a requirement would have a widespread and destructive effect on the expectations of thousands of parties engaged in day-to-day business transactions involving copyrights. Parties that have obtained—and *paid for*—transfers of copyright ownership would be severely punished for failing to comply with the recording formality. The failure to record—and resultant failure to transfer—might not even be discovered until a later time when the purchaser has relied to its detriment on the apparent acquisition of rights. Defects in chain of title may be discovered much later, disrupting downstream exploitation of the copyrights involved and the expectations of numerous third parties. The proposal would create a severe penalty for a ministerial error, one that would reverberate along chains of title everywhere.

In any event, all three proposals are unworkable given the millions of transfers of rights that occur in the motion picture and television industry, much less all of the other copyright industry sectors, which could not be timely and accurately recorded by any current or future Copyright Office recordation system. A simple, highly functional, user-friendly system will do much more than these proposals to increase recordations.

Instead, any new requirements to record would create massive inefficiencies in the copyright recordation system. Such new requirements would risk overwhelming the Copyright Office and the recordation system. It would severely impede the number one goal of the Copyright Office to significantly reduce the processing time of recordations as well as the timely inputting of data into the Office's online database.

In addition to impeding progress in improving the recordation system, any mandated recordation system would be harmful and unfair especially to individual authors and small businesses, as well as to MPAA business partners from abroad, all of whom would be unable to keep up with an avalanche of required filings. For foreign rightsholders it would be nearly impossible to comply with, and especially timely to comply with, any mandated recordation system.

In fact, a mandatory recordation system would not be viable for any domestic or foreign remitters acquiring properties (whether foreign or domestic) where a full chain of title for the property may not be available. Such a mandatory recordation system would hurt many well-meaning rightsholders, including in some cases (due, for example, to inadvertence) MPAA members. The many harmful consequences of mandatory recordation led Congress to abandon that system during U.S. accession to the Berne Convention in the late 1980s.

Making a transfer invalid unless recorded with the Copyright Office is extremely problematic, and would severely disrupt the expectation of parties in copyright transactions. For such a system to be viable at all, the Copyright Office system would have to be very fast, very efficient, and very accurate (error-free) to avoid extreme harm to parties who regularly transfer millions of rights in licenses and sub-licenses, and who would otherwise have to record. With an overwhelming increase in the number of required recorded documents, absent a large-scale upgrade in the Office's staff and systems, the recordation system would inevitably be slower, not faster, than the current system, leaving parties to a transfer in limbo while awaiting information to populate the Copyright Office database before the transfer could be deemed valid.

Tying recordation to standing, remedies, or the validity of the transfer would serve as an unnecessary burden for the unwary rightsholder (much as other formalities were in the pre-Berne era). That is why Congress abandoned this formality over two decades ago. Missing the recording of a single document in a complicated chain of title, for example, should not preclude standing to sue or effective remedies against copyright infringers. These are necessary tools to fight commercial piracy.

It is not practical to require all remitters to record every single document, which would entail huge costs—in staff time and administrative fees and costs to record all assignments, licenses, mortgages, corporate name changes and the like. This would add to transactional costs, making the buying and selling of copyrighted properties more expensive (and including

additional insurance and legal fees for errors or omissions, and failures to comply with representations and warranties), and ultimately result in costly litigation. There would be no public benefit to such recordation requirements. The end result would be less, not more, material, being made available to the public. Meanwhile, the considerable benefits of voluntary recordation in terms of ease of standing to sue to enforce rights, and effective remedies as enforcement tools (based on compliance with existing, sections 411 and 412, and the required timely registration requirements), would be lost.

Applying any mandatory recordation system would also conflict with our international treaty obligations under the Berne Convention and the World Trade Organization TRIPS Agreement. As was noted by the Senate Judiciary Committee during Berne accession in 1988:

The committee concludes that the recordation requirement of section 205(d) [which then mandated recordations], at least as applied to foreign works originating in Berne countries, is incompatible with the Berne [Article 5(2)] prohibition against formalities as preconditions for the “enjoyment and exercise” of copyright.

Senate Rep. on the Berne Convention Implementation Act of 1988, S. REP. NO. 100-352, 100th Cong. 1st Sess., at 26 (1988).

This is the reason why section 205(d) was amended in 1988 to replace mandatory recordation with the current voluntary system, and with the incentives in sections 205.

Lastly, requiring recordations (certainly for the validity of transfers) would raise other legal challenges, including possible due process “takings” challenges, especially if the changes were either made retroactive (to past or pending transfers), or, for post-enactment transfers, if the Copyright Office’s delays, or its failure to record the documents as the result of an administrative or bureaucratic error, invalidated the transfer.

MPAA Comments on Three Specific Copyright Office Proposals

The FRN seeks comments on three proposed changes to the current recordation system: (1) the use of a guided remitter responsibility model of electronic recordations; (2) the use of structured electronic documents; and (3) the use of standardized identifiers and other metadata standards.

We comment specifically below on each of these proposals, but also note more generally the need for MPAA members to work closely with the Copyright Office on these proposals. Such cooperation could allay fears of possible disruption to existing contractual or other industry production and distribution practices if these proposals are improperly implemented.

1. Guided remitter responsibility model of electronic recordation.

The Copyright Office is considering “adopting a model under which remitters would be responsible in the first instance for the accuracy of the catalog information that they submit electronically” so that Copyright Office recordation specialists would not check the information in documents and not re-enter that data into the system (which has been a source of data entry

errors). This would likely include the use of drop-down boxes and the ability to include repeated information (such as party names and addresses), both of which would be helpful to MPAA members (and other large-volume users of the recordation system) for the completion of the recordation of documents. However, the “guided remitter” model does raise some questions. For example, how much more time-consuming to the remitter would this new process be than the current completion of a document “cover sheet” for recorded documents?

One additional suggestion is to allow remitters of documents to correct their filings before they are “officially” incorporated into the Copyright Office database. At present, when an error, however minor, is discovered in a recorded document that has been sent to the Office, the only option is to re-file a corrected document. This means the Copyright Office database retains the old, incorrect, document in the system as well. This is also the only method to “correct” recordation errors, since the Office’s Form CA, for corrections and amplifications, is available only for errors in the registration system, not for recordation. There should be some system to allow for errors to be corrected in the recordation system besides requiring the re-filing of a new corrected document, to permit amended documents, and a more reliable database of information.

2. Structured electronic documents.

The Copyright Office is considering “whether to adopt standards for and accept structured documents in which tagged indexing and cataloging information is integrated into the documents themselves.”

To form an opinion, MPAA members need to know more about this proposal, such as whether it would be permissible or mandatory as an alternative to current practices. MPAA members would oppose a mandatory system because it would create undue administrative burdens on parties wishing to record documents, if, for example, they would need to program their documents with tagged indexing or cataloging information. Such a requirement would likely be most burdensome for smaller companies and for individuals, as many rightsholders would be unable to create structured electronic documents without significant investment in technology and know-how. Instead, the metadata that would be provided by encoding could be captured through the user interface.

However, if the Copyright Office proposal is for a voluntary system, the MPAA members would support it, and would be willing to work with the Copyright Office to help draft some sample documents for the voluntary use of remitters. The MPAA members encourage the Office to consider such voluntary use of structured electronic documents for all types of regular and common submissions including, for example, short-form assignments.

We would suggest that any new system allow for all types of users to search and interface with the new types of documents that would be remitted, regardless of the technical level of the documents. The type of document remittance (electronic, paper, manual) should not become a deterrent for the user to access the proposed structured electronic documents which will be prepared by others. In this way, remitters could submit documents to be recorded using the current manual process (for infrequent users), with structured documents for high-tech users, or by a hybrid system for the vast majority of high volume users. The document cover sheet could then be replaced by a new remitter-responsibility based data entry system.

Many of the legal documents and forms, and the business practices used by our companies, are specific to the feature film, television and new media production and distribution businesses. That is why we strongly recommend that the Copyright Office not mandate any particular documents or forms that must be recorded. We recommend instead that the Office allow business practices – different in the various copyright industries – to dictate recordation practices, and that the Office permit the voluntary use of any necessary documents and forms used in those industries.

3. Use of standardized identifiers and other metadata standards.

The Copyright Office is “considering whether it should adopt incentives or requirements” to have standard identifiers such as the “International Standard Audiovisual Numbers” in recorded documents. As with many of the other proposals, the MPAA would support the voluntary use of these identifiers and metadata, but would oppose a mandatory requirement. For example, it would be very burdensome to require the use of ISAN numbers, or to require indexes or links within documents. It would, however, be helpful to have text within documents that is searchable, including PDF documents, again, in a voluntary, rather than in any mandatory recordation system.

Conclusion

The MPAA members look forward to continuing to work with the Copyright Office as it moves forward with any changes to its recordation system, and to offer our considerable experience with the existing recordation system and the use of the Office’s database. Additionally, the MPAA members look forward to working with the Office on tying the proposed recordation improvements and recommendations, to the equally, if not more important, changes to the Copyright Office’s registration system. We believe that we share the common goal of a more efficiently run registration and recordation system for the benefit of copyright owners and user alike.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael O'Leary". The signature is stylized and fluid, with a long horizontal stroke at the end.

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