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Sarang V. Damle  
General Counsel and Associate Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

*By Electronic Submission*

**RE: Comments to Notice of Proposed Rulemaking for Modernizing Copyright Recordation**

Dear Mr. Damle:

Authors Alliance writes to offer comments in response to the United States Copyright Office's Notice of Proposed Rulemaking for Modernizing Copyright Recordation.<sup>1</sup> Authors Alliance is a nonprofit organization representing the interests of authors who want to take advantage of opportunities of the digital age to share their creations with readers, promote the ongoing progress of knowledge, and advance the public good.<sup>2</sup> Our more than 1,200 members share the Office's interest in ensuring that the public record of copyright transactions is as timely, complete, and accurate as possible.

Authors Alliance applauds the Office for commencing this rulemaking. Our comments, attached, express our support for the proposed amendments to 37 CFR Part 201 that reduce barriers to recordation, laying the foundation for an improved public record of copyright ownership and making it easier for authors to exercise their termination rights. We also identify additional ways the Office could incentivize, improve, and support recordation, including:

- **Provide Incentives to Encourage Recordation of Transfers of Copyright Ownership:** Authors Alliance encourages the Copyright Office to recommend and Congress to implement better incentives for rights holders to record transfers of copyright ownership by, for example, conditioning the validity of a transfer on the transferee's recordation of the transfer and tying certain remedies to a subsequent copyright holder's recordation of her transfer.
- **Provide Incentives to Record Transfers by Operation of Law:** Authors Alliance encourages the Copyright Office to consider how to link transaction records of transfers by operation of law or improve incentives for transferees to record such transfers.

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<sup>1</sup> Modernizing Copyright Recordation, 82 Fed. Reg. 22771 (May 18, 2017).

<sup>2</sup> For more information about Authors Alliance, see AUTHORS ALLIANCE, *About Us*, [www.authorsalliance.org/about](http://www.authorsalliance.org/about) (last visited June 26, 2017).

- **Strengthen Incentives to Keep Ownership Contact Information Accurate and Up to Date:** Authors Alliance encourages the Copyright Office and Congress to provide meaningful incentives to encourage copyright owners to keep contact information accurate and up to date by, for example, limiting the remedies available to owners who do not timely update their contact information when a defendant can show that the inaccurate information derailed a good faith attempt to secure permission from the owner.
- **Provide a Mechanism to Record Diligent Search Data for Orphan Works:** The Copyright Office should consider creating a mechanism for users of orphan works who conduct searches for ownership information to be able to record this research and make it available to the public.
- **Reduce Fees for Electronic Submission of Documents for Recordation:** Authors Alliance recommends that the Copyright Office reduce fees for electronic submission of documents for recordation.
- **Hire Technologists and Economists to Support Modernization Efforts:** As the Office takes steps to develop a modernized electronic recordation system, Authors Alliance urges the Office to hire technologists and economists to support these modernization efforts.

These recommendations are explained in greater detail in our attached comments.

We hope our comments will be helpful as the Office moves toward the development of a modernized electronic recordation system.

Respectfully submitted,



Brianna Schofield  
*Executive Director, Authors Alliance*

## I. Authors Alliance Supports Changes That Improve Copyright Ownership Records and Help Authors Exercise Termination Rights

### *Improved Copyright Ownership Records Will Benefit Authors*

The copyright system works best when authors as well as the public can identify and locate copyright owners. In the absence of accurate and robust ownership records, works are more likely to become “orphans” for which copyright owners cannot be found for purposes of asking permission to make uses that are within copyright owners’ exclusive rights.<sup>3</sup> By facilitating permission requests, improved ownership records will benefit authors as both producers and users of content.

Ownership records can help authors increase the compensation for and dissemination of their own works.<sup>4</sup> If an author transferred the copyright in her work, a record of the current owner—often a publisher—can help ensure that she receives royalties for downstream uses of her works, if available. Even in the absence of potential royalties, many authors care about ensuring that their works remain widely available to be read and built upon by other creators. Many Authors Alliance members worry about oblivion for works that are locked into copyrights for which no one can find the key; ownership records can help others secure necessary permissions and, as a result, prevent authors’ works from becoming orphans.

Perhaps counterintuitively, incomplete ownership records can sometimes prevent an author from reusing her own works.<sup>5</sup> Authors often sign over the rights to their works to publishers or other distributors. When these authors want to bring their own books back into print, anthologize their own writings, or otherwise reuse their own works, they can be prevented from doing so because they can no longer find the works’ copyright owners. This is not an abstract problem. Several Authors Alliance members have recently sought to revert rights to their own out-of-print works in order to make them newly available.<sup>6</sup> In at least one case, the author’s publisher did not know if it still owned the copyright in the work and had no ownership records to shed any light on this issue.

Finally, as content creators, authors may want to seek permission to use other authors’ copyrighted materials in their works.<sup>7</sup> Without publicly available information about a chain of

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<sup>3</sup> See, e.g., U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 26 (2006), available at <https://www.copyright.gov/orphan/orphan-report-full.pdf> (describing how, even if an author or copyright owner can be identified from a copy of a work, “events since the creation of that copy can affect the ability of a subsequent user to identify or locate the current copyright owner”).

<sup>4</sup> See 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. 1583, 1585 (2013).

<sup>5</sup> See Molly Shaffer Van Houweling, *Making Copyright Work for Authors Who Write to be Read*, 38 COLUM. J.L. & ARTS 381, 382 (2015) (describing how the situation may arise that the person who wants permission is the author herself and how improved recordation would help alleviate this issue).

<sup>6</sup> For examples of Authors Alliance members who have successfully reverted rights and made their works newly available, see AUTHORS ALLIANCE, *Rights Reversion Success Stories*, <http://www.authorsalliance.org/category/rights-reversions/rr-successes/> (last visited June 26, 2017).

<sup>7</sup> In some situations, of course, authors can rely on fair use. 17 U.S.C. § 107. In other situations, authors may need to secure permission for the use.

title, it can be difficult for these authors to find a work’s copyright owner.<sup>8</sup> In some cases, the inability to trace the copyright owner of a work can cause an author to decide not to use a particular work, or even to abandon a project altogether.<sup>9</sup>

### *Reduced Barriers for Authors to Exercise Termination Rights Will Benefit Authors*

Just as improved ownership records benefit authors, so too does the statutory right to terminate transfers.<sup>10</sup> The termination of transfer provisions allow authors to regain their copyrights to enjoy more of a work’s financial success. Importantly, termination rights also enable authors to regain rights to works no longer being commercially exploited in order to make them widely available to new audiences. Despite these benefits to authors and the public, termination rules are complicated and formalistic, which likely contributes to underutilization of this important tool.<sup>11</sup>

Authors Alliance, together with Creative Commons, is developing tools to help authors understand termination of transfer provisions and adhere to the regulations governing the form and timing of notices of termination.<sup>12</sup> Our Termination of Transfer Tool, currently in beta, helps authors calculate termination and notice windows.<sup>13</sup> Efforts to streamline and simplify any part of the termination process, including the required submission of a copy of the notice of termination to the Copyright Office, are a much-needed step in the right direction to reduce barriers for authors exercising termination rights.

### *Authors Alliance Supports the Copyright Office’s Proposed Changes That Will Improve Copyright Ownership Records and Facilitate Termination of Transfers*

Because of the benefits outlined above, Authors Alliance commends the Office for taking steps to improve copyright ownership records and facilitate termination of transfers.

In particular, allowing remitters to submit documents for recordation electronically has the potential to make it easier, faster, and cheaper to record transfers and submit notices of termination. (Please see Section II, below, for a recommendation related to fees.) We are hopeful that the to-be-developed electronic interface will be designed to walk remitters through the submission requirements to help ensure that they provide compliant and complete documents.

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<sup>8</sup> See AUTHORS ALLIANCE, *Why Does the Authors Alliance Care About Orphan Works*, <http://www.authorsalliance.org/2014/07/02/why-does-the-authors-alliance-care-about-orphan-works/> (last visited June 26, 2017).

<sup>9</sup> See, e.g., REPORT ON ORPHAN WORKS, *supra* note 3, at 15. (“In the situation where the owner cannot be identified and located... the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use... Concerns have been raised that in such situation, a productive and beneficial use of the work is forestalled—not because the copyright owner has asserted his exclusive rights in the work, or because the user and the owner cannot agree on the terms of a license—but merely because the user cannot locate the owner.”).

<sup>10</sup> 17 U.S.C. § 203, § 304(c), and § 304(d).

<sup>11</sup> See R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 898-99 (2016) (describing how hurdles imposed by the statute’s complex formalities can potentially stymie attempts to exercise termination rights).

<sup>12</sup> See TERMINATION OF TRANSFER TOOL, *Intro*, [www.rightsback.org/intro](http://www.rightsback.org/intro) (last visited June 26, 2017).

<sup>13</sup> See TERMINATION OF TRANSFER TOOL, *Returning Authors’ Rights: The Termination of Transfer Tool*, <https://rightsback.org/questionnaire/> (last visited June 26, 2017).

For example, we think it will be useful to prompt remitters to make the required certifications by providing acceptable certification language and allowing them to check a box and/or electronically sign their names, as suggested in the notice of proposed rulemaking.<sup>14</sup> Additional explanatory resources and online tools provided by the Copyright Office could also be developed to help guide remitters to provide the required information and help minimize the need for further communication from the Office to fix technical problems with submissions.<sup>15</sup>

Authors Alliance commends the Office for recognizing that people making certifications required for recordation may not have access to original copies of documents. We support the recommendation to change the requirements so that the certification need only be made “to the best of the certifier’s knowledge.”<sup>16</sup> Similarly, we support the proposal to expand the categories of people who can make a certification to accompany the submission of a copy of a document to any person having an interest in a copyright to which the document pertains or such person’s authorized representative.<sup>17</sup> There are many situations in which no party to the underlying document is available to sign the certification and the proposed changes reduce the barriers for remitters who find themselves in this situation. In turn, these changes help prevent the works of authors who are no longer living or are otherwise unable to submit certifications from becoming orphans. (See Section II, below, for our related recommendation to provide incentives to record transfers made by operation of law.)

Authors Alliance also supports the proposal to make all transfer documents available on the Internet, with the proposed redaction rules in place.<sup>18</sup> In order for ownership records to help facilitate permissions requests, the information included in recorded documents needs to be accessible to the public.<sup>19</sup> Making recorded documents fully available online will improve their accessibility. We are also pleased to see the Office’s indication that it intends to explore making documents recorded prior to the electronic submission system’s introduction also available online,<sup>20</sup> and encourage the Office to prioritize this effort.

## **II. The Copyright Office Should Consider Other Ways to Incentivize, Improve, and Support Recordation**

Improving copyright ownership records and facilitating the termination of transfer process are high-value objectives with significant attendant benefits for authors and the public. While the

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<sup>14</sup> Modernizing Copyright Recordation, *supra* note 1, at 22774.

<sup>15</sup> See Robert Brauneis, TRANSFORMING DOCUMENT RECORDATION AT THE U.S. COPYRIGHT OFFICE 76 (Dec. 2014), <https://www.copyright.gov/docs/recordation/recordation-report.pdf> (noting that 24% of documents within a six-week test period had problems requiring correspondence from recordation staff to address).

<sup>16</sup> Modernizing Copyright Recordation, *supra* note 1, at 22774.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 22776.

<sup>19</sup> Further, as the Brauneis Report highlights, under 17 U.S.C. § 205(c), “if a document can be found through a reasonable search under the title or registration number of a work, all persons are deemed to have constructive notice of “the facts stated in the recorded document.” Brauneis, *supra* note 15. As the Brauneis Report concludes, “the current recording system deems everyone to have knowledge that it makes very expensive for everyone to obtain...” *Id.*

<sup>20</sup> Modernizing Copyright Recordation, *supra* note 1, at 22776.

Copyright Office's proposals begin to address current shortcomings in the recordation process, Authors Alliance offers the following suggestions to further incentivize, improve, and support recordation.

*Provide Incentives to Encourage Recordation of Transfers of Copyright Ownership*

As outlined above, authors who want to save their own works from becoming orphaned and thereby relegated to out-of-print oblivion, as well as those who want to use other authors' works, will benefit from improved records of transfers of copyright ownership.<sup>21</sup> Because of the importance of accurate ownership records, Authors Alliance encourages the Copyright Office to recommend and Congress to implement better incentives for rights holders to record transfers of copyright ownership. Authors Alliance supports two recommendations for providing such incentives to encourage recordation of transfers of copyright ownership.

First, Professor Jane Ginsburg and other commentators have proposed that the validity of a transfer should be contingent on the transferee's recordation of the transfer.<sup>22</sup> Under this proposal, failure to record a transfer would mean the transfer would be treated as a nonexclusive license. This proposal would benefit, for example, an author who signs an agreement transferring exclusive copyright to her own work to a publisher but, because the publisher failed to record the transfer, can no longer locate the current copyright owner to seek permission to use her own work.<sup>23</sup> In this case, the copyright owner's transfer of exclusive rights would be invalidated and the author would be able to reuse her work (while the non-recording publisher would still hold a nonexclusive license).<sup>24</sup>

Second, commentators have suggested that certain remedies, for example statutory damages and attorneys' fees, should be tied to a subsequent copyright holder's recordation of her transfer.<sup>25</sup> Calibrating remedies is especially important to help prevent would-be users of orphan works from abandoning uses or projects for fear of potentially high costs of inadvertent infringement.<sup>26</sup> In turn, this helps authors who fear their works will no longer be available in the future should the ownership records for the work not be complete.

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<sup>21</sup> See AUTHORS ALLIANCE, *Principle 2: Improve Information Flows About Copyright Ownership*, <http://www.authorsalliance.org/principles-and-proposals-for-copyright-reform/principle-2/> (last visited June 26, 2017) (recommending that public recording of changes in copyright ownership be required).

<sup>22</sup> See Ginsburg, *supra* note 4, at 1612-13.

<sup>23</sup> See Molly Shaffer Van Houweling, *Land Recording and Copyright Reform*, 28 BERKELEY TECH. L.J. 1497, 1509 (2013).

<sup>24</sup> See *Id.*

<sup>25</sup> See Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It*, 28 BERKELEY TECH. L.J. 1460, 1491 (2013) ("At least statutory damages and attorneys' fees should be conditioned on timely recordation."); Maria Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1421 (2013) (positing requiring assignees and exclusive licensees to register their interests in a work and then record their licenses and assignments in a timely manner as a condition for statutory damages as a potential way to encourage copyright owners to record transfers). *But see* Ginsburg, *supra* note 4, at 1597-1600 (concluding that under Article 5(2) of Berne, optional remedies may not be conditioned on compliance with formalities).

<sup>26</sup> See David Fagundes, *Crystals in the Public Domain*, B.C. L. REV. 139, 178 (2009) ("Users who cannot identify the owner or copyright status of a work face prohibitive risks of infringement.").

### *Provide Incentives to Record Transfers by Operation of Law*

Transfers by operation of law—inheritance by intestate succession, corporate mergers, and involuntary transfers in bankruptcy proceedings, for example—may also lead to gaps in the chain of title for a work.<sup>27</sup> Authors Alliance encourages the Copyright Office to consider how to link records of these transactions or improve incentives for transferees by operation of law to record such transfers.<sup>28</sup>

### *Strengthen Incentives to Keep Ownership Contact Information Accurate and Up to Date*

The benefits of recordation cannot be realized unless the public record about copyright owner information is accurate and up to date. Therefore, Authors Alliance encourages the Copyright Office and Congress to provide meaningful incentives to encourage copyright owners to keep contact information accurate and up to date. For example, Congress might amend the Copyright Act to limit the remedies available to owners who do not timely update their contact information when a defendant can show that the inaccurate information derailed a good faith attempt to secure permission from the owner.<sup>29</sup> At minimum, the Office should follow the Brauneis Report recommendation to reduce the fee for entering a change of address to a nominal or zero charge.<sup>30</sup>

### *Provide a Mechanism to Record Diligent Search Data for Orphan Works*

The Office should consider creating a mechanism for users of orphan works who conduct searches for ownership information to be able to record this research and make it available to the public.<sup>31</sup> The Office could, for example, create a dedicated portal on its new electronic submission site for users of orphan works to record information they were able to discover about

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<sup>27</sup> See Ginsburg, *supra* note 4, at 1617-19 (2013).

<sup>28</sup> See *Id.* at 1618 (stating that when these transfers have their own recordation requirements, records of these transfers could be linked to copyright records, or, failing that, it may be desirable to impose additional burdens of copyright recordation on the trustee in bankruptcy, testamentary executor, or other transferees by operation of law).

<sup>29</sup> See AUTHORS ALLIANCE, *Principle 2: Improve Information Flows About Copyright Ownership*, <http://www.authorsalliance.org/principles-and-proposals-for-copyright-reform/principle-2/> (last visited June 26, 2017) (recommending that the incentives for updating copyright owner contact information be strengthened). See also Gervais & Renaud, *supra* note 25, at 1492 (recommending that “[t]ransferees should have an obligation... to keep their contact information up-to-date” and, at a minimum, “if a user requested that the Copyright Office send a notice to the last known address... of a transferee and the transferee fails to respond... then copyright should not be enforceable beyond minimally required remedies”).

<sup>30</sup> Brauneis, *supra* note 15, at 128-129 (describing how high costs virtually guarantee that contact information will rarely be updated at the Copyright Office).

<sup>31</sup> For a thorough description of how information provisions by users can improve the copyright information infrastructure and a proposal of how to promote this information provision, see Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431 (2013).

a work.<sup>32</sup> Providing a way for users to record the results of their searches would improve the records and benefit subsequent potential users.<sup>33</sup>

### *Reduce Fees for Electronic Submission of Documents for Recordation*

The current fees for submission of documents for recording transfers of copyright ownership or notices of termination<sup>34</sup> can be a barrier for authors or other copyright owners whose works have low commercial value but are nonetheless culturally or historically valuable works.<sup>35</sup> For example, an author may want to exercise her termination right in an out-of-print book so that she can make it openly available online, but may be discouraged by the current cost of recordation. Such a result would be a loss for the public which would have otherwise had renewed access to the work. Moreover, reducing recordation fees is especially important if incentives are put in place to encourage compliance so that authors or copyright owners of works with little or no commercial value are not unduly harmed.<sup>36</sup> For these reasons, Authors Alliance recommends that the Copyright Office reduce fees for electronic submission of documents for recordation.

### *Hire Technologists and Economists to Support Modernization Efforts*

As the Office takes steps to develop a modernized electronic recordation system, greater technological and economic expertise is essential for the Copyright Office. Staff with technological expertise are needed to advise the Office about how to redesign its electronic registration system and how to address technology policy issues that arise from this initiative. Staff with economic and other social science expertise would also benefit the Office by, for example, providing evidence-based recommendations on how to redesign the recordation system so that a broader range of rights holders record transfers of ownership. Authors Alliance urges the Office to hire technologists and economists to support these modernization efforts.

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<sup>32</sup> The Office's proposal to expand the categories of people who can make a certification to accompany the submission of a copy of a document, discussed in Section I, is a useful step toward operationalizing this idea.

<sup>33</sup> See Shaffer Van Houweling, *supra* note 23, at 1508 (comparing proposals that encourage both copyright owners and subsequent investors to provide information that enhances copyright information infrastructure to land recording rules that enrich land records and minimize controversies).

<sup>34</sup> Currently \$105 for one document and \$35 for each additional group of 1-10 documents. 37 CFR Part 201.3.

<sup>35</sup> See Brauneis, *supra* note 15, at 54 ("High recordation fees are likely deterring recordation, particularly of smaller-value transactions.").

<sup>36</sup> See Ginsburg, *supra* note 4, at 1614 (noting that if recordation is a prerequisite to the validity of the transfer, it may be necessary to introduce some flexibility in the fee schedule).