WORKING PAPER

Intellectual property: what is owned, what was given away, and what to change

The Transmission Standard gives away more than most ventures own. That is deliberate and most of it should stand. But a document that licenses a corpus it may not hold the rights to, and a mark that cannot lawfully do both of the jobs assigned to it, are defects rather than choices. This paper works through every class of right, separates the deliberate giveaways from the accidental ones, and drafts the amendments that close the gaps.

Four findings that need action before v1.0.

① §15.7 licenses the corpus under CC BY-SA, and nothing in the Standard collects the rights needed to do that. The Successor authors the Practice Sheet, the Master authors the elicitation answers, and a Sponsor owns the deposit — none of them grants a sublicensable publication right.

② The same mark cannot be both a certification mark and an ordinary service mark held by the same owner. The USPTO says so directly. §12.4 contemplates a certification-mark filing while the operating company trades under the same name.

③ §12.4's trigger can collide with 15 U.S.C. §1060(a)(1): an intent-to-use application may not be assigned before a statement of use is filed, except to a successor to the ongoing business. A premature transfer to a Standards Entity voids the application.

④ The harvested transmission index names people who never consented. Publishing it free is one risk posture; selling it is a materially different one, and the case law now moving through the courts is about exactly this.

The giveaways, and whether each should stand

What	Terms	Assessment
The Standard text	CC BY-ND 4.0 (§1.7)	Stands. Copyright is retained; no-derivatives prevents forked standards, which is the point of §3.7. Note that a CC license once granted is irrevocable as to that version — intended here, but worth knowing it cannot be walked back.
The corpus of Practice Records and taxonomies	CC BY-SA 4.0 (§15.7)	Stands in principle — amendment, translation and mirroring are derivative acts, so a non-forkable corpus could not survive. The chain of title behind the grant does not. See below.
The elicitation protocol, Annex K	CC BY-ND, royalty-free to implement (§1.7, §18.3)	Stands. The protocol is a list of questions; the corpus is the asset. Publishing it also forecloses any patent position, which is the right trade.
Register public fields	Free bulk export, daily export, three mirrors (§6.5, §17.2)	Stands. Redundancy is the survival mechanism and the mirrors are what make the register outlive its operator.
Deposit materials	Never licensed to a third party for a fee (§9.5)	Stands. This is the clause that keeps the register from becoming an archive that resells what was entrusted to it.

What	Terms	Assessment
Implementation rights	Royalty-free (§1.7)	Stands, and is inconsistent with ever asserting a patent on the method. That inconsistency should be made explicit rather than left to be discovered.

FINDING ONE

The corpus is licensed on rights the Standard never collects

§15.7 states that Practice Records are licensed under CC BY-SA 4.0. A CC BY-SA grant authorizes downstream users to reproduce, adapt and redistribute. The Registrar can only grant that if it holds those rights or holds a sublicensable license to them. Trace the authorship:

- **The Practice Sheet** is written by the Successor, in the Successor's own words (§4.2(c)). The Successor is its author.
- **The elicitation transcript** records the Master's answers (§4.7(f), Annex C). US practice treats an interviewer and interviewee as owning their respective questions and answers absent an agreement — the Copyright Office's own Compendium takes that position, and *Suid v. Newsweek* supports it. The Master is at least a co-author of the transcript and quite possibly the sole author of the substance.
- **Where there is a Sponsor,** §9.5 gives the Sponsor ownership of the recordings and Practice Sheets, granting the Registrar a perpetual archival license and "a publication license only if the Deposit is Open." A publication license is not a sublicensable license to authorize third-party derivative works.
- **Where there is no Sponsor,** §9.5 gives the Registrar the recordings it makes and says nothing at all about the Practice Sheets or the Practice Record.

Consequence. On the current text the Registrar publishes the corpus under a license it may not be entitled to grant, every published Practice Record is a potential claim by its Successor, its Master or its Sponsor, and every downstream user who relied on CC BY-SA — including the mirrors §17.2 requires — inherits the defect. This is the most consequential problem in the document and it is also the easiest to fix, because Annex C is already signed by all three parties.

Proposed §15.8 — Rights in a Practice Record

> *(a) Each of the Master, the Successor and any Sponsor grants the Registrar, on signing the Map, a perpetual, irrevocable, worldwide, non-exclusive, royalty-free and sublicensable license to reproduce, adapt, publish and distribute the Practice Record and every component of it, including the elicitation transcript, and to license it to the public on the terms of §15.7. The grant is made for the purpose of §15.5 and may not be withdrawn; nothing in it transfers ownership of any underlying know-how (§3.6, §9.5).*
>
> *(b) The grant is a condition of entry on the Register. A person unwilling to make it should not take part, and is told so before the first Session rather than after the Record issues.*
>
> *(c) Where a Sponsor elects Sealed status or an embargo under §9.6(d), the grant is not thereby defeated; it takes effect on publication.*
>
> *(d) Withdrawal of a name under §5.5 and erasure under §13.7 operate on identification, not on the license in trade method.*

Annex C already carries signature lines for Master, Successor and Sponsor. Adding the grant there costs nothing and cures the defect prospectively. Records issued before the amendment need a short confirmatory license from the parties — cheap now, expensive at a hundred Records.

FINDING TWO

The mark cannot do both jobs

The USPTO states the rule plainly: a certifying organization cannot register the same mark as both a certification mark and any other type of trademark, because consumers could not tell whether goods come from the certifier or merely meet its standards. Section 14 of the Lanham Act, 15 U.S.C. §1064(5), backs this with four cancellation grounds — the owner does not control the mark, the owner produces or markets goods or services to which the mark is applied, the mark is used for purposes other than to certify, or the owner discriminately refuses to certify a person who meets the standards.

Two of those four are already satisfied by the design, which is worth noticing. §6.6, §10 and §11.1 give real control over who may display the Mark. §3.9 and §4.6(g) make refusal to record almost impossible — there is a free conforming route and refusal is limited to incompleteness, failed independence or an integrity finding. A register built to be unrefusable is a register built for a certification mark, whether or not that was the intention.

The collision is elsewhere. The Mark is currently doing two different jobs. On a practitioner's plaque and invoice it certifies that a transmission was recorded — that is certification use, by someone other than the owner. On the register's own training services and database it identifies the source of the Registrar's services — that is ordinary service-mark use, by the owner. The intent-to-use applications in Classes 41 and 42 are for the second. A certification-mark application under §12.4 would be for the first. They cannot both be ROOT & BRANCH in the same hands.

Three ways out, and the one to take

Option	Assessment
Never file a certification mark; rely on ordinary marks plus contractual licensing to Entries	Workable and cheapest. Risk: licensing a mark to hundreds of Entries without documented quality control invites a naked-licensing abandonment defense. The control exists in §§6.6, 10 and 11 but has never been written as a license.
Split the marks by function — a certification mark for practitioner use, a different mark for the company's own services	Legally clean and commercially weak. Two brands to build, and the plaque and the data product stop reinforcing each other.
Split by entity — the Standards Entity holds the certification mark; the operating company holds its own marks for training, database and data services	Recommended. §12.4 already builds the Standards Entity, so the structure exists. The certification mark sits with a body that performs no certified service, which satisfies §1064(5)(B) squarely, and the operating company keeps ordinary marks for what it actually does. The cost is that the most valuable mark leaves the operating company permanently.

The third option has a consequence that should be decided deliberately rather than discovered. §12.4 already commits to transferring the Standard, the Mark and the governance to a separate entity on the earlier of a certification-mark filing or five hundred Entries in Good Standing. That is a divestiture of the venture's most durable asset, written into a published document, on a trigger that could fire early. If that is intended, it should be intended knowingly. If it is not, the trigger should move before v1.0 — after which it is a published commitment that reviewers, candidates and institutional adopters will have relied on.

Proposed §12.4A — Sequencing

> *(a) The Registrar does not apply to register the Mark as a certification mark until a mark distinct from the Mark has been adopted and applied for in respect of the Registrar's own services, and no application for either may be transferred while it stands as an intent-to-use application without a filed statement of use, except to a successor to the ongoing and existing business to which the mark pertains.*
>
> *(b) On constitution of the Standards Entity, the certification mark and this Standard pass to it; the Registrar retains its own marks in respect of services it itself performs, and holds no right to certify.*

The assignment bar is 15 U.S.C. §1060(a)(1). A transfer of a live intent-to-use application outside that exception does not merely fail — it can invalidate the application. §12.4 as drafted can require exactly that transfer at a moment when the applications are still intent-to-use.

FINDING THREE

What actually protects the datasets

Copyright: thin, and thinner than it looks

Facts are not copyrightable and a factual compilation is protected only in its original selection, coordination and arrangement — *Feist* — which is thin protection that does not reach the underlying facts. Worse for the Red List, 17 U.S.C. §102(b) excludes any procedure, process, system or method of operation, and the assessment rule is published precisely so that anyone may re-run it. The rule is unprotectable by design. What is protectable is the expression: the per-trade narrative, the wording of each category rationale, the arrangement of the evidence. That is worth registering and it is not worth relying on.

One enforcement mechanic to get right. *Fourth Estate v. Wall-Street.com* settled that a copyright claim cannot be brought until the Copyright Office has acted on the application, not merely received it. For a work that updates continuously, that means registering editions on a schedule rather than at the moment infringement is discovered, when the wait is months.

The European database right, and why the wrong dataset qualifies

Directive 96/9/EC gives the maker of a database a fifteen-year right against extraction and re-utilization where there has been substantial investment in **obtaining, verification or presentation** of the contents, renewed by substantial new investment. Two features decide its usefulness here.

- **Eligibility.** Article 11 confines the right to nationals or habitual residents of a Member State, and to companies formed under Member State law with a genuine ongoing link to a Member State economy. A Delaware corporation has no sui generis right at all. Acquiring one means an EU-established subsidiary with real economic activity as the maker of the database — a genuine structural option, and a real annual cost.
- **What counts as investment.** *British Horseracing Board v William Hill* held that investment in *creating* the data does not count; only obtaining, verifying and presenting it does. That inverts the intuition here. The Red List is created data — assessments computed by a rule — and is the weaker candidate. The transmission index is obtained and verified data, harvested from published sources, deduplicated, year-stamped and quality-flagged, and is the stronger one.

The practical read: the EU right is available but not for free, and it would protect the dataset that carries the publicity exposure rather than the one that carries the revenue. Worth a decision, not worth an assumption.

Trade secret: thin by design, and not empty

Nearly everything is published, so there is little classic trade secret. What remains is real and should be treated as such: the Instrument's internals and prompts; the harvest tooling and source list; the corrections queue before publication; subscriber and pipeline records; and the internal mapping between practices and occupation codes before it is published. Protection requires the usual: written confidentiality terms, access control, marking, and exit procedures.

A jurisdictional note worth carrying. The federal Defend Trade Secrets Act reaches everywhere, but among the four states of admission here New York has **not** adopted the Uniform Trade Secrets Act and applies common-law doctrine from Restatement of Torts §757, including a continuous-use element that some New York courts still enforce. Florida, California and Georgia are UTSA states. Choice of law and forum in contributor and subscriber agreements should be set with that difference in mind rather than inherited from a template.

FINDING FOUR

Named people in a dataset that is sold

The Red List names no individuals. The register names people who consented under §13.2 and may withdraw. The adoption format carries an explicit four-value consent field and publishes nothing marked as declined. The harvested transmission index is the exception: roughly 3,130 pairings of named individuals, compiled from published program sources, none of whom was asked.

Publishing that freely, with links back to the program that published it first, is a defensible public-interest posture. Licensing it commercially is a different posture, and a wave of litigation is currently testing exactly that boundary against people-search and data-broker services under the Illinois right of publicity statute and its equivalents. The outcomes have split. The defense that has worked best is the one in *Dobrowolski v. Intelius* — that selling information is not a commercial use of identity, because the information *is* the product. The theory that has survived dismissal is the opposite one: that names shown in free previews are being used to *advertise* a paid product.

That distinction is a design rule, and it is cheap to honor. Names may appear in the product. Names must never appear in the promotion of the product — no named example in a sales page, no named record in a free preview that exists to sell a subscription, no practitioner's name in a case study for the commercial tiers. New York's §§50–51 reach use "for advertising purposes or for the purposes of trade" and carry a post-mortem right since 2020; Florida, California and Georgia each have their own statute or common-law rule. The register's own consent architecture handles the consented names. The harvested index is where the exposure sits.

Recommendation on the index

- Keep the named rows in the free public tier, presented as a bibliography of what programs have already published, with a link to each source and a removal route on request.
- Exclude the named rows from every paid tier. License the program-level and aggregate view — counts, coverage, continuity, gaps by program and year — which is what an institutional buyer actually wants and which names nobody.
- Never use a harvested name in any material that promotes a paid tier.
- Honor removal requests on the harvested index without argument. It costs one row and forecloses the claim.

Patents, and why not

The elicitation method is a business method facing *Alice*; the hash-chained capture of Annex L sits in crowded notarization and timestamping art. Neither is worth the money. More decisively, §1.7 already grants a royalty-free right to implement the Standard, including software that reads, verifies or anchors Records, and §18.3 publishes the protocol on purpose. Asserting a patent later would contradict published commitments the whole adoption strategy rests on. The recommendation is to state the position rather than leave it ambiguous.

> **Proposed §1.9 — Patents.** *The Registrar holds no patent and will seek none in respect of the methods this Standard describes, and grants every implementer a perpetual, irrevocable, royalty-free license under any patent it may nonetheless come to hold that would be infringed by implementing this Standard. A standard that can be implemented only at the sufferance of its author is not an open standard.*

POSITION

Where the durable value actually sits

Stripping out what is given away and what is legally thin, four things remain, and only two of them are intellectual property in the ordinary sense.

1. **The Instrument.** §18.2 already vests all rights in the Registrar with a written assignment executed before any contribution — which is the correct treatment, since commissioned software does not vest by default and work-for-hire does not reach most contractors. Two additions: the assignment should carry a waiver of moral rights to the extent waivable and a covenant of originality, and the build should carry a dependency policy, because a copyleft component pulled into the Instrument would do more damage than any competitor.
2. **The marks.** The strongest conventional asset, and the one most exposed to being mishandled by the certification-mark question and the §12.4 trigger. Classes 41 and 42 are cleared and should be filed; the certification-mark decision should be made before the Standard reaches v1.0, not after.
3. **The refresh history.** Not protectable and not copyable. A competitor may re-run the rule today and cannot manufacture four years of having run it. Time is the moat; the legal system is not.
4. **The corpus.** Deliberately forkable. Its defensibility is that it accumulates and that §4.7(c) compares each new Master's account against everything already held — which a copy taken today does not replicate tomorrow. This is §18.3's reasoning and it holds, provided the chain of title in Finding One is fixed so that what accumulates can lawfully be published.

Order of work

When	What	Why then
Now	File Classes 41 and 42 as already cleared. Execute Instrument assignments for every contributor to date.	Both are cheap, neither depends on an unresolved question, and the assignment gets harder with every contributor added.
Before v1.0	Amend §15.7/§15.8 chain of title; add §12.4A sequencing; decide the certification-mark question; add the patent position; add the assessment-integrity clause.	v1.0 is the version institutions adopt and rely on. Every one of these is a published commitment afterwards.
Before the first paid subscriptio n	Restrict the harvested index to the free tier; write the Mark license to Entries with its control terms; register the first Red List edition with the Copyright Office.	Commercialization is what converts the publicity question from theoretical to live, and registration takes months.
Later, if ever	EU subsidiary as database maker; state trademark registrations; design protection on the plaque.	Each is a real option with a real annual cost and none of them is load-bearing.

What this paper does not settle

Four questions are outside what desk research can responsibly answer and are flagged for primary research rather than guessed at: whether a for-profit entity's ownership of a certification mark raises any practical examination difficulty beyond the statutory use restriction; the current state of split authority on right-of-publicity claims against data products, which is moving quickly; whether the "purposes of trade" limb of New York §51 has been applied to a subscription reference database; and the precise interaction between §1060(a)(1) and a transfer to a newly constituted standards body, where the "successor to the ongoing and existing business" exception may or may not reach an entity created for the purpose.

Root & Branch Register Inc. · IP working paper, September 2026 · Against Transmission Standard v0.5. Authority relied on: 15 U.S.C. §§1054, 1060(a)(1), 1064(5); USPTO certification mark application guidance and TMEP ch. 1306; 17 U.S.C. §102(b); Feist Publications v. Rural Telephone Service, 499 U.S. 340 (1991); Fourth Estate v. Wall-Street.com, 586 U.S. 296 (2019); Suid v. Newsweek and Copyright Office Compendium III on interview authorship; Directive 96/9/EC arts. 7, 10, 11; Case C-203/02 British Horseracing Board v William Hill; the Defend Trade Secrets Act and Restatement of Torts §757 as applied in New York; N.Y. Civ. Rights Law §§50–51; and the current right-of-publicity docket against data providers. This is a working paper for internal use, not an opinion, and each proposition above should be confirmed against primary sources before it is relied on.