

## Note

### **Expedition E-Recording, First Stop URPERA: How Universal E-Recording Under URPERA Could Revolutionize Real Estate Recording in the United States and Why it Should**

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The writer's cramp is free, and the headaches have just begun. In a world where Americans do everything from banking transactions to making travel plans<sup>1</sup> over the Internet, buying property in most real estate recording jurisdictions in the United States requires a return to the pre-Google era of paper contracting.<sup>2</sup> Closing<sup>3</sup> on property is a time and often labor-

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1. See, e.g., Press Release, Am. Bankers Ass'n, ABA Survey Shows More Consumers Prefer Online Banking (Sept. 30, 2010), available at <http://www.aba.com/Press+Room/093010PreferredBankingMethod.htm> (showing that thirty-six percent of people surveyed prefer banking online, the most in any category); *Travel Facts and Statistics*, U.S. Travel Assoc., <http://www.ustravel.org/news/press-kit/travel-facts-and-statistics> (last visited Aug. 23, 2011) ("The Internet was used by approximately [ninety] million American adults to plan travel during the past year."). Online banking and travel booking are used here simply as examples to show the prevalence of doing business online in the United States.

2. R. Wilson Freyermuth, *Why Mortgagees Can't Get No Satisfaction*, 72 MO. L. REV. 1159, 1165 (2007); see, e.g., Kaihan Krippendorff, *The Unexplainable Rise of Google*, FASTCOMPANY (Jun. 22, 2011), <http://www.fastcompany.com/1762286/the-unexplainable-rise-of-google>; *The Rise of Google*, USA TODAY (Apr. 30, 2004 3:45 AM), [http://www.usatoday.com/money/industries/technology/2004-04-29-google-timeline\\_x.htm](http://www.usatoday.com/money/industries/technology/2004-04-29-google-timeline_x.htm) (illustrating how Google went from unknown to daily use in little more than a decade). Google is used to demonstrate how rapidly Americans have turned to technology to conduct business. See, e.g., Press Release, Am. Bankers Ass'n, *supra* note 1; *Travel Facts and Statistics*, *supra* note 1. See generally Lasagne A. Wilhite, *Promoting E-Legal Behavior: Litigation and Counseling: The Best Way to Approach E-Legal Issues Is to Be Mindful of the Nuances of Contract Law That Are Unique to Electronic Behavior*, 20 PRAC. LITIGATOR 45, 46-47 (2009) (discussing the

intensive process involving not only face-to-face meetings with title company agents but also paid searches of the property records to ensure that the title transferred is that represented by the seller followed by the physical recording of the deed with the county.<sup>4</sup> Every individual county (or other recording jurisdiction) maintains these property records for each parcel of land under its jurisdiction.<sup>5</sup> As sales of mortgage interests from lenders to the secondary mortgage market<sup>6</sup> became more prevalent, there was a need to streamline the recording process in order to make the sales of these interests more efficient.<sup>7</sup> As a result, Mortgage Electronic Recording System (MERS) was created by lenders and served as an intermediary tool between county recorders and buyers on the secondary mortgage market.<sup>8</sup> MERS, however, holds a questionable legal status and has

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legal implications of the rise in technology use to complete transactions).

3. BLACK'S LAW DICTIONARY 291 (9th ed. 2009) (defining a closing "in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred" and noting that closing may also be termed as settlement).

4. See, e.g., GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 219-35 (8th ed. 2009) (describing the title search process in detail); Cynthia E. Brodrick, Survival Guide to a Real Estate Closing, BANKRATE.COM (Mar. 15, 2004), <http://www.bankrate.com/brm/news/real-estate/buyerguide2004/closing.asp> (offering a brief overview of the closing process).

5. Please note that Alaska and Hawaii maintain property records at the state level rather than at the county level, and some New England towns maintain their own property records. NELSON ET AL., *supra* note 4, at 203. For the purposes of this Note, county level recording will be discussed, but many of the arguments made for county level recording will apply to state and town level recording as well.

6. See Shmuel Vasser, *The "Evil" Securitization and the American Dream*, 13 J. BANKR. L. & PRAC. 1 Art. 2, for a detailed discussion and analysis of the origins of the secondary mortgage market, Fannie Mae and Freddie Mac, as well as an introduction to mortgage-backed securities. See also NELSON ET AL., *supra* note 4, at 483-542, for background information on transfers of mortgagees' interests.

7. See, e.g., Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 LOY. J. PUB. INT. L. 177, 181-83 (2010) (discussing the creation of MERS in 1997 by members of the lending industry). But see Eric Dash, *Chase Acts to Broaden Foreclosure Reviews*, N.Y. TIMES, Oct. 14, 2010, at B1 (discussing the fact that JPMorgan Chase has stopped using MERS for foreclosures); David Streitfeld, *Report Criticizes Banks for Handling of Mortgages*, N.Y. TIMES, Apr. 14, 2011, at B3 (reporting that agreements to improve MERS process are unlikely to bring about real change because banks are left to regulate themselves).

8. Dordan, *supra* note 7.

been targeted, in the media and in court, in the midst of the foreclosure crisis.<sup>9</sup>

Legislative solutions were also drafted—first in the form of the Uniform Electronic Transactions Act (UETA),<sup>10</sup> then the Uniform Real Property Electronic Recording Act (URPERA).<sup>11</sup> Under these uniform acts, an electronic document under specific conditions is legally valid and enforceable, and the electronic document memorializing the transaction can be legally recorded with the county.<sup>12</sup> The current slow-moving paper-based system of real estate recording could be streamlined to shorten a process that once could take upwards of a year to fully complete to one that takes a matter of hours to fully complete.<sup>13</sup>

The goal of this Note is to examine the viability and desirability of implementing fully electronic real property recording in every recording jurisdiction within the United States. Part I will discuss the current paper-based recording system, how and why MERS came into existence, and the legislative advances that make electronic document recording (e-recording) a possibility along with the advantages and potential risks associated with such a system. Part II will analyze the practical and legal

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9. See, e.g., Scot J. Paltrow, *Life on MERS: Archive is at center of mortgage mess*, REUTERS (Jul. 18, 2011, 6:41 PM), <http://www.reuters.com/article/2011/07/18/foreclosure-banks-mers-idUSL3E7IE2DY20110718> (discussing MERS in general and its recent challenges in courts across the United States).

10. Nat'l Conference of State Legislatures, *Uniform Electronics Transactions Act*, <http://www.ncsl.org/default.aspx?tabid=13484> (last visited Aug. 24, 2011) [hereinafter *UETA*] (providing an overview of UETA and lists which states have adopted its legal framework).

11. Nat'l Conference of Comm'rs Unif. State Laws, *History of Uniform Real Property Electronic Recording Act*, PENN L., [http://www.law.upenn.edu/bll/archives/ulc/urpera/URPERA\\_Final\\_Apr05-1.htm](http://www.law.upenn.edu/bll/archives/ulc/urpera/URPERA_Final_Apr05-1.htm) (last visited Aug. 24, 2011) [hereinafter *URPERA*] (providing the full text of URPERA).

12. *UETA*, *supra* note 10; *Id.*

13. See, e.g., *E-Recording in Allen County*, ALLEN CNTY. RECORDER, <http://www.allencountyrecorder.us/Services/ERecording.aspx> (last visited Aug. 25, 2011); *ERecording*, CLAY CNTY. CLERK OF THE CIR. CT., <http://clayclerk.com/Services/erecording.html> (last visited Aug. 26, 2011) (showing how county recorders promote electronic document recording because of faster document turnaround); *Submitter Customers: Value Proposition*, SIMPLIFILE, <http://www.simplifile.com/eRecording/submitter-value-proposition.jsp> (last visited Aug. 25, 2011) (showing how an electronic-submission firm markets its services to recorders' offices). *But see* Arundhati Parmar, *Delay in Recording Documents 'Very Unusual'*, FIN. & COM. (Sept. 13, 2010, 4:04 PM), <http://finance-commerce.com/2010/09/delay-in-recording-documents-very-unusual/> (discussing a situation in which recording was delayed up to two years, though an Olmsted County official claimed this was a highly unusual occurrence).

reasonableness of converting the current paper-based system to a predominantly, eventually entirely, electronic real property recording system. This Note concludes that the implementation of an e-recording system in every recording jurisdiction in the United States is not only possible, but preferable.

## I. BACKGROUND

### A. YOU CAN PUT A MAN ON THE MOON, BUT DON'T PUT THAT DEED ON A HARD DRIVE

Real estate recording in most jurisdictions in the United States remains a paper-based process.<sup>14</sup> Generally speaking, an individual state's recording acts govern the manner of recording and what documents<sup>15</sup> may be recorded as well as what statutory protections are associated with the recording of that instrument.<sup>16</sup> Recording acts come in three basic forms: notice, race, and race-notice.<sup>17</sup> Each sets out a standard for determining which interests should be prioritized if a conflict arises.<sup>18</sup> A "race" type state gives precedence to the purchaser that records

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14. Freyermuth, *supra* note 2. "Paper-based" here refers to the fact that in those recording jurisdictions where the recording statutes do not allow for the use and recording of electronic documents, an actual physical copy of the real estate instrument must be submitted and recorded at the county recorder's office. This creates the situation where electronic real estate contracts, though legally valid under UETA, cannot be legally recorded. *See infra* Section I, Part C. "The purchaser or claimant would present the document to the recorder who would copy it longhand into the records of the town or county. A subsequent purchaser could then inquire at the recorder's office in the town or county in which the land was physically located for copies of the documents affecting the seller's title." Dean Arthur R. Gaudio, *Electronic Real Estate Records: A Model for Action*, 24 W. NEW ENG. L. REV. 271, 272 (2002) (discussing the paper-based recording system which began in the United States during colonial times when documents were copied by hand, rather than by machine).

15. Documents recorded include, but are not limited to, deeds, liens, and mortgages. NELSON ET AL., *supra* note 4, at 202; *see also Document Filing and Recording Checklist—Recorder/Registrar*, HENNEPIN CNTY., <http://hennepin.us/portal/site/HennepinUS/menuitem.b1ab75471750e40fa01dfb47ccf06498/?vgnextoid=d3ce6b6a38de3210VgnVCM20000048114689RCRD> (last visited Aug. 24, 2011) (listing the recording requirements for various documents in Hennepin County).

16. Recording is not required for a real estate transaction to be legally valid. However, recording acts in every state make recording the instrument memorializing the transaction beneficial because recording triggers certain statutory protections. NELSON ET AL., *supra* note 4, at 204–05.

17. *Id.* at 206.

18. *Id.*

his interest first, regardless of the chronology of the actual purchase.<sup>19</sup> “The ‘notice’ and ‘notice-race’ states seem to say, ‘Why should we let B take advantage of A’s failure to record if B knew about A anyway, or if B paid nothing for the land (so that she has nothing to lose)?’”<sup>20</sup> Whatever the state recording acts are that govern the transaction, recording the instrument is the only way to receive the recording act’s benefits.

In the most basic terms, recording a document in the property records of the jurisdiction is a straightforward but lengthy process where the document to be recorded is filed, recorded, and indexed by an employee of the recorder’s office.<sup>21</sup> Proper indexing is a key component in the process which allows the recorded instrument to be found at a later date.<sup>22</sup> The recording process, from submission to recording, takes time, and there is often a delay, or gap, between when the document is submitted to the recorder’s office and when that document is officially recorded and indexed.<sup>23</sup> The whole system is prone not only to potential mistakes, especially human errors in indexing the documents, but also to physical destruction in case of fire or

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19. *Id.*

20. *Id.* In this case, A is the first purchaser and B is a subsequent purchaser of some interest in the property. Generally speaking, parties with competing interests must be bona fide purchasers, or purchasers in good faith, in order to receive the statutory benefits of the recording acts. *Id.*

21. *Id.* at 220. There are two systems of indexing used in the United States: tract, or parcel, indexing and grantor-grantee indexing. *Id.* “From the searcher’s viewpoint, indexing by tract or parcel is by far the better method.” *Id.* With parcel indexing, documents are indexed according to the parcel of land to which they pertain. With grantor-grantee indices, documents are indexed in one index by the grantee’s name and in a second index by the grantor’s name. *See generally id.* at 220–27.

22. *See id.*; *Keeping Current—Property*, PROB. & PROP., May/June 2010, at 21 (discussing the potential implications of both an improperly indexed document and an incomplete title search).

23. Jerel J. Hill, *Recent Developments in Title Insurance Law*, 41 TORT TRIAL & INS. PRAC. L.J. 735, 749 (2006) (“The gap is the time between the last title update before closing and the recording of the documents.”). The gap can impact the accuracy of the title search because a valid, recordable interest may exist, but may be yet to be recorded—making it unsearchable. *See, e.g.*, Kevin M. Baum, Note, *Apparently, “No Good Deed Goes Unpunished”: The Earmarking Doctrine, Equitable Subrogation, and Inquiry Notice Are Necessary Protections when Refinancing Consumer Mortgages in an Uncertain Credit Market*, 83 ST. JOHN’S L. REV. 1361, 1398–99 (2009) (providing an example of how the gap can be especially problematic in notice jurisdictions where recording is treated as giving notice of the submitting party’s interest in the property to all other parties).

natural disaster.<sup>24</sup>

The recorded documents must be retrieved each time a new interest in the property arises that requires a title search to be conducted.<sup>25</sup> A title search creates a chain of title that can be used to determine who holds what interests in the property in question.<sup>26</sup> If a document was recorded, but improperly indexed, finding it during a title search is nearly impossible, and there will be a missing link in the chain of conveyances.<sup>27</sup> Further complications arise when there are unrecorded interests in the property.<sup>28</sup> Not surprisingly, the difficulties and imperfections of title searching have led to the establishment of the title

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24. See, e.g., John C. Murray, *Defective Real Estate Documents: What Are the Consequences?*, 42 REAL PROP. PROB. & TR. J. 367, 391–95 (2007) (giving numerous examples of mortgage documents indexed under misspelled or incorrect names); DAVID STANFIELD, TERRA INST., ADMINISTRATION OF IMMOVABLE PROPERTY RECORDS IN NEW ORLEANS (2008), available at [http://www.terrainstitute.org/pdf/Stanfield\\_Admin\\_PropRec-V3.pdf](http://www.terrainstitute.org/pdf/Stanfield_Admin_PropRec-V3.pdf) (covering the difficulties Hurricane Katrina caused for recording in New Orleans after the storm); Press Release, RecordFusion, RecordFusion's Technology to Solve South Carolina's Land Records Crisis (June 28, 2006) available at [http://www.recordfusion.com/news/pressreleases/RF\\_tech\\_solve\\_south\\_carolina\\_land\\_records\\_crisis.htm](http://www.recordfusion.com/news/pressreleases/RF_tech_solve_south_carolina_land_records_crisis.htm) (discussing South Carolina's preparations to protect records in case of a hurricane).

25. See NELSON ET AL., *supra* note 4, at 219–33. New property interests that may require a title search to be conducted include a transfer of all or a portion of the title to the property, mortgage financing or refinancing as well as other liens on the property such as mechanics and tax liens. *Id.* at 210–13.

26. *Id.* at 219–20. A chain of title traces recorded interests in property from the original government patent of the land to the current interest holders. In short, all recorded interests in the subject property are compiled and reviewed to determine which parties hold what interests. This “guarantees” to the buyer or other interested party that the interest holder not only has the interest he claims to have, but also that he has the ability to transfer that interest. Unrecorded interests, however, make this an imperfect tool offering only a partial guarantee of being accurate. *Id.* at 219–20, 227–33.

27. See, e.g., Murray, *supra* note 24.

28. See NELSON ET AL., *supra* note 4, at 227–33. Unrecorded interests are not limited to transfers that were simply not recorded, but those that were gained through adverse possession or other undocumented means. *Id.* at 210–11. Once the statute of limitations has run on the adverse possession, the adverse possessors acquire all the legal rights to the title that was adversely possessed. See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2422 (2001). A quiet title action in which the court adjudicates the state of title is required to record such interests. See generally *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L. J. 1245 (1959). Adverse possession, though a factor in the ultimate stability of a title, is beyond the scope of this Note.

insurance industry.<sup>29</sup> Lenders, in particular, rely on title searches and the accompanying title insurance when funding real estate transactions.<sup>30</sup>

## B. EXPEDITION MERS

The sale of mortgage interests on the secondary mortgage market adds an additional layer of complexity to the recording process.<sup>31</sup> As discussed earlier, a party has a vested interest in recording its interest in the property, and the mortgage lender is no different.<sup>32</sup> The secondary mortgage market is, in the simplest terms, the sale of a mortgage interest by the originating lender to another lender.<sup>33</sup> When the mortgage interest is sold, the new lender would technically have to record this new interest with the respective county recorder.<sup>34</sup> For lenders purchasing mortgage interests by the hundreds or thousands and totaling in the trillions of dollars, recording every one of these

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29. See NELSON ET AL., *supra* note 4, at 238–39. Title insurance companies perform title searches and then issue insurance policies based on the results protecting the insured from unrecorded interests and certain other title defects. *Id.* If covered title defects arise which affect the quality of title, the policy will cover the costs of remedying the defect or paying the insured damages caused by the defect. *Id.*; see also *Title Division*, IN.GOV, <http://www.in.gov/idoi/2608.htm> (last visited Aug. 25, 2011); *Thinking of Buying A Home?*, OKLA. B. ASS'N, <http://www.okbar.org/public/brochures/homebroc.htm> (last updated Jan. 2008).

30. Title defects may have a substantial negative impact on property value. In typical mortgage lending, a mortgagee, or lender, loans funds to the mortgagor in exchange for a mortgage lien on the property for the loan amount. If a title defect has decreased the property value, the mortgagee may not be able to borrow as much money. If the mortgage is already in place, the mortgagee faces carrying at least a partially unsecured loan. See, e.g., sources *Title Division* and *Thinking of Buying A Home?* cited *supra* note 29.

31. See NELSON ET AL., *supra* note 4, at 483–542; Vasser, *supra* note 6.

32. See NELSON ET AL., *supra* note 4, at 204, 483–542.

33. *Id.* at 483; see, e.g., Vasser, *supra* note 6 (“Currently, the two largest players in the secondary mortgage market are Freddie Mac and Fannie Mae.”).

34. See NELSON ET AL., *supra* note 4, at 483–542; Vasser, *supra* note 6. “Prior to the creation of MERS, when one lender wanted to sell her interest in a mortgage to another lender, she had to execute a written assignment of the mortgage, which the purchaser would record in the local land records. . . . [M]ortgage lenders and investment banks sought to make the transfer of residential mortgages cheaper and easier, and so MERS was born. MERS functions as an electronic clearinghouse that allows lenders to circumvent the process of recording assignments and paying recording fees to the county clerk’s office.” Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1621–22 (2011).

sales is problematic to say the least.<sup>35</sup>

Lenders and the secondary mortgage market responded to the need to document ownership of mortgage interests more quickly and cheaply by creating MERS.<sup>36</sup> MERS allows member lenders to almost entirely bypass the county recording process.<sup>37</sup>

A lender that has become a member of MERS still records newly originated mortgages in the official land records as traditionally required. However, instead of listing itself as the owner of the mortgage, the lender names MERS as mortgagee, but “solely as nominee”—meaning only as an agent—for the lender, and for the lender’s “successors and assigns.” If the lender subsequently assigns the mortgage to another MERS member, the assignment need not be recorded because the new owner is among the original lender’s “successors and assigns.” Consequently, newly originated mortgages are recorded only once, even if they are subsequently transferred among MERS members. Instead of tracking changes of ownership in the official land records, MERS tracks the transfer of its members’ mortgages electronically in a private database. MERS continues to track the mortgages until they are satisfied, transferred to a non-MERS member, or the borrower defaults on the loan.<sup>38</sup>

In light of the foreclosure crisis,<sup>39</sup> MERS has come under fire both in the media and in the courts.<sup>40</sup> Courts have been

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35. See, e.g., Jennifer Dixon, *Who are Fannie Mae and Freddie Mac?*, SEATTLE TIMES (Aug. 26, 2011 10:00 PM), [http://seattletimes.nwsourc.com/html/realstate/2016015328\\_fanniemaehistory28.html](http://seattletimes.nwsourc.com/html/realstate/2016015328_fanniemaehistory28.html) (detailing Freddie Mac and Fannie Mae’s uncertain future). “The gap” is a problem here as well because if multiple sales have occurred in rapid succession, it may be impossible to determine which lender actually holds the mortgage interest at any given time. See Baum, *supra* note 23; Hill, *supra* note 23.

36. Dordan, *supra* note 7; *About MERS*, <http://www.mersinc.org/about/index.aspx> (last visited Aug. 26, 2011).

37. Robinson, *supra* note 34, at 1621–23.

38. *Id.*, at 1622–23. It follows that the only way to know which lender owns a particular mortgage interest is to have access to MERS.

39. See, e.g., Dixon, *supra* note 35 (discussing the role of Fannie Mae and Freddie Mac in the financial crisis within the United States); Kerri Panchuk, *Case Against MERS Reaches Supreme Court*, HOUSINGWIRE (Aug. 17, 2011, 2:49 PM), <http://www.housingwire.com/2011/08/17/case-against-mers-reaches-supreme-court> (“MERS, the electronic registry at the center of the foreclosure crisis, has been under fire nationwide as foreclosure attorneys purport the firm, and its parent company Merscorp Inc., illegally foreclosed on properties.”).

40. See, e.g., Panchuk, *supra* note 39 (discussing legal challenges to

hearing and deciding cases challenging the legal validity of the entire MERS arrangement.<sup>41</sup> The central argument of a vast majority of these cases is that MERS, as an organization, is legally unable to foreclose on mortgage liens in arrears.<sup>42</sup> Defaulting mortgagors argue that because MERS organization itself does not hold any interest in the mortgage, it has no legal standing to bring a foreclosure action for a default on the loan.<sup>43</sup> Early decisions have generally not fallen in the favor of mortgagees, but the United States Supreme Court has yet to rule on the issue.<sup>44</sup>

### C. ONE SMALL STEP FOR E-RECORDING, ONE GIANT LEAP FOR ELECTRONIC CONTRACTING

Responding to the same difficulties which MERS sought to correct, state legislatures across the nation have passed legislation addressing electronic contracting and real estate recording. The first step in the process was the enactment of the UETA or similar legislation in every state.<sup>45</sup> UETA makes electronic contracting and electronic signatures as legally valid as their pa-

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MERS); Streitfeld, *supra* note 7 (criticizing proposed remedies to MERS situation, specifically that lack of governmental or other external oversight makes any substantial changes to the process unlikely); Dash, *supra* note 7 (reporting that in response to MERS difficulties, some large banks are moving away from the use of the system in foreclosure actions); Scot J. Paltrow, *Life on MERS: Archive is at center of mortgage mess*, REUTERS (Jul. 18, 2011, 6:41 PM), <http://www.reuters.com/article/2011/07/18/foreclosure-banks-mersidUSL3E7IE2DY20110718> (outlining the possible shift in the judicial decision-making tide away from ruling in favor of MERS in foreclosure cases).

41. See, e.g., *Lipscomb v. Mortg. Elec. Registration Sys., Inc.*, No. 1:11-CV-497 AWI JLT, 2011 WL 3361132 (E.D. Cal. Aug. 3 2011); *Gomes v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 3d 819 (Cal. Ct. App. 2011). But see *Sacchi v. Mortgage Elec. Registration Sys., Inc.*, No. CV 11-1658 AHM (CWx), 2011 WL 2533029 (C.D. Cal. June 24, 2011).

42. Foreclosure, briefly, is a remedy available to lenders and lien holders when the mortgagor fails to pay off the debt according to the terms of the note or contract. When the mortgagor defaults, the lender is legally able to sell the property to recoup the amount owed on the loan. See, e.g., *Foreclosure*, MAINE.GOV, [http://www.maine.gov/pfr/consumercredit/foreclosure\\_resources/whatisforeclosure.html](http://www.maine.gov/pfr/consumercredit/foreclosure_resources/whatisforeclosure.html) (last visited Aug. 27, 2011) (offering general information on the foreclosure process). See generally NELSON ET AL., *supra* note 4, at 586–842.

43. Panchuk, *supra* note 39 (discussing one case challenging MERS that has been filed with the United States Supreme Court, but no ruling has been made as to whether the Court will actually hear the case).

44. *Id.*

45. UETA, *supra* note 10, (providing a summary of UETA and listing states adopting the law).

per and ink counterparts.<sup>46</sup> UETA failed to take hold in the real estate world, however, because it left state recording acts untouched.<sup>47</sup> Without altering recording requirements, legally valid electronic contracts could not be recorded and would not be afforded the benefits of recording; thus, electronic contracting did not take hold in real estate transactions.<sup>48</sup>

In response to this, the URPERA was drafted by the Uniform Law Commission to address specifically the issues of electronic contracting and recording in real estate.<sup>49</sup> URPERA “removes any doubt with regard to the ability of a local recording office to accept and otherwise process electronic documents and signatures for recording.”<sup>50</sup> URPERA includes the following statutory provision: “If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this [act].”<sup>51</sup> The model code was written in this way—covering each possible requirement in a state’s recording act—because the Uniform Law Commission sought to enable state legislatures to simply adopt URPERA as written in order to make enactment a simpler process.<sup>52</sup>

The act has only been adopted and enacted by twenty-four states plus the District of Columbia.<sup>53</sup> In total, fewer than sev-

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46. *See id.*

47. *See generally* David E. Ewan, John A. Richards & Margo H. K. Tank, *It’s the Message, Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments*, 60 BUS. LAW. 1487 (2005) (discussing the difficulties arising out of the use of electronic documents in real estate transactions under UETA).

48. *Id.* at 1489. The authors argue that while UETA may have made it possible for e-recording to be a legally valid option, URPERA makes it a certainty. *Id.* at 1502–06.

49. URPERA, *supra* note 11.

50. *Real Property Electronic Recording Act Summary*, UNIF. L. COMM’N, <http://uniformlaws.org/ActSummary.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (last visited Aug. 27, 2011) [hereinafter URPERA Summary].

51. URPERA, *supra* note 11, at § 3(a).

52. *See generally id.* (including notes to state legislators on what must be done before the act can effectively facilitate the transition to an electronic real estate records system).

53. Nat’l Conf. of Comm’rs Unif. State Laws, *Enactment Status Map*, UNIFORM L. COMM’N, <http://uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (last visited Aug. 27, 2011); Nat’l Conf. of

en hundred of the nation's three thousand plus counties have made some form of e-recording available to constituents—reaching less than half of the American population.<sup>54</sup> In fact, Colorado is the only state with multi-jurisdictional recording offering e-recording in every county.<sup>55</sup> It is also important to note that where URPERA is enacted traditional recording may remain because the act only makes e-recording a legal possibility,<sup>56</sup> and even in those jurisdictions where URPERA has been enacted, e-recording has been slow to catch on.<sup>57</sup>

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Comm'rs Unif. State Laws, *Legislative Fact Sheet - Real Property Electronic Recording Act*, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (last visited Aug. 27, 2011).

54. Press Release, Prop. Recs. Indus. Ass'n, eRecording Counties Top 600 Mark (Feb. 18, 2011), available at [http://www.pria.us/files/public/News/Press\\_Releases/PRIA/2011/eRecordingCountiesTop600Mark021811.pdf](http://www.pria.us/files/public/News/Press_Releases/PRIA/2011/eRecordingCountiesTop600Mark021811.pdf). Compare Steve Sobieszczyk, *How Many Counties Are There in the United States?*, U.S. GEOL. SURV. (Apr. 4, 2008), <http://gallery.usgs.gov/audios/124> (transcript of audio also available at this site); *Overview of County Government*, NAT'L ASS'N OF CNTYS., <http://www.naco.org/counties/pages/overview.aspx> (last visited Aug. 25, 2011) with *eRecording Jurisdictions*, Prop. Recs. Indus. Ass'n, (available to PRIA members, on file with author) (illustrating the number of counties by state with some form of e-recording). See also, *eRecording Population Coverage*, Prop. Recs. Indus. Ass'n, (available to PRIA members, on file with author) (illustrating the percentage of the population by state with access to some form of e-recording).

55. Press Release, Prop. Recs. Indus. Ass'n, Colorado Attains 100 Percent Engagement (Apr. 11, 2011), available at [http://www.pria.us/files/public/News/Press\\_Releases/PRIA/2011/Colorado\\_Reaches\\_100\\_Percent.pdf](http://www.pria.us/files/public/News/Press_Releases/PRIA/2011/Colorado_Reaches_100_Percent.pdf). However, complete implementation did not occur until early 2011, so data is not yet available on the program's success.

56. Pa. Ass'n of Notaries, *Legislature Studies URPERA Proposal in Pennsylvania*, NOTARYBLOG (Aug. 7, 2008), <http://blog.notary.org/2008/08/legislature-studies-urpera-proposal-in-pennsylvania/> (discussing how the proposed enactment of URPERA in Pennsylvania would impact real estate recording in that state, including a note that "URPERA does not require land records officials to accept electronic documents. The decision to accept electronic documents for recording is up to the individual recorder or the individual state.>").

57. Joe Forward, *Act Fast: E-recording Real Estate Documents Helps Clients Win the Recording Race*, ST. B. OF WIS. (May 4, 2011), <http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&Contentid=102138> (using Wisconsin as an example to demonstrate that despite the many advantages of e-recording, the practice has been slow to catch on among lawyers and title companies). Forward also notes the advantage of utilizing e-recording in a race jurisdiction. *Id.* In Wisconsin, both electronic and paper submissions are still accepted, but electronic submission is much quicker than mailing paper documents. *Id.*

## D. DESTINATION E-RECORDING: ARE WE THERE YET?

“The Property Records Industry Association (PRIA) is a coalition of government and business established to foster dialog among property record industry participants, to promote mutual understanding of different perspectives on issues of common interest and to develop consensus leading to shared standards and practices.”<sup>58</sup> E-recording is among the uniform recording standards that the PRIA promotes.<sup>59</sup> The organization offers a wide range of resources to counties considering making the move to e-recording.<sup>60</sup> Three models of e-recording, representing various points along an e-recording continuum, are presented as options for establishing e-recording within a jurisdiction.<sup>61</sup>

Model 1 is a solely electronic submission system in which paper and ink documents are scanned by the submitting party and sent electronically to the recorder.<sup>62</sup> These Model 1 images are static and still require manual data entry by recorders just like paper documents.<sup>63</sup> Model 2 is slightly more complex and uses a particular file format that allows for limited automated indexing.<sup>64</sup> Ink and electronic signatures as well as paper or fully electronic documents can be used in Model 2; however, the functionality of the automated data retrieval is limited by how well the original document can be converted into the particular file format needed.<sup>65</sup> Both Models 1 and 2 require a significant amount of human involvement in the recording process.<sup>66</sup>

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58. *Mission Statement*, PROP. RECS. INDUS. ASS'N, <http://www.pria.us/i4a/pages/index.cfm?pageid=3297> (last visited Aug. 26, 2011) (broadly stating the goals of the organization and its membership).

59. *See generally Standards & Publications*, PROP. RECS. INDUS. ASS'N, <http://www.pria.us/i4a/pages/index.cfm?pageid=3281> (last visited Aug. 28, 2011) (showing that a majority of the organization's publications relate to informing county recorders about why and how best to implement an e-recording system).

60. *Id.*

61. PROP. RECS. INDUS. ASS'N., *THE MODELS OF ERECORDING: A CONTINUUM OF ELECTRONIC RECORDING UPDATED (2009)*, available at [http://www.pria.us/files/public/Standards\\_Publications/Current/eRecording\\_Models\\_Style\\_Rev\\_Final\\_%28Clean%2907142010.pdf](http://www.pria.us/files/public/Standards_Publications/Current/eRecording_Models_Style_Rev_Final_%28Clean%2907142010.pdf) [hereinafter *MODELS OF ERECORDING*].

62. *Id.* at 2–3.

63. *Id.*

64. *Id.* at 3.

65. *Id.*

66. *Id.* at 2–3. Models 1 and 2 require that the recorder either manually

Model 3 requires significantly less involvement by recorders to complete the recording process.<sup>67</sup> The documents submitted for recording are entirely electronic and are in a searchable format which allows not only automated data entry, but indexing as well.<sup>68</sup> Model 3, however, does not allow for paper and ink documents to be submitted.<sup>69</sup> Each model requires different levels of technological support and investment. Each also offers some means for speeding up the recording process.<sup>70</sup>

#### E. IT DOESN'T TAKE A ROCKET SCIENTIST TO KNOW WE NEED A COMPUTER SCIENTIST

A fully functioning e-recording system must meet a number of technological and practical requirements. Cost and information security are at the forefront of the technological side of the equation. “[M]any jurisdictions have not implemented electronic recording due to costs. Installing the necessary hardware and software, training personnel, and converting already recorded documents to electronic form are expensive.”<sup>71</sup> Even with the necessary funding and resources, the data must be safeguarded from outside tampering<sup>72</sup> as well as loss in the

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enter data or review whether the data was properly collected from the document. *Id.*

67. *Id.* at 3.

68. *But see id.* (noting that some human input is still required with the focus now shifting to “exception processing and quality control”).

69. *Id.*

70. *ERecording*, REKON TECH., <http://www.rekon.com/html/Products/..%5Cerecording%5Cindex.html> (last visited Aug. 28, 2011) (illustrating the potential for streamlining the recording process on the submitter side of recording from multiple steps to three).

71. Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1073 (2007).

72. These information security issues are not unique to e-recording. Banks, international corporations, and the federal government weigh these concerns on a nearly daily basis. *See generally* Kevin McCaney, *Hacker vs. DC Voting System: Hacker Win*, GOV'T COMPUTER NEWS (Oct. 5, 2010), <http://gcn.com/articles/2010/10/05/sl-dc-voting-system-hacked.aspx> (chronicling the hacking of the D.C. online voting system which was totally taken over by hackers during a trial run of the system); Julian E. Barnes & Siobhan Gorman, *Cyberwar Plan Has New Focus on Deterrence*, WALL ST. J. (July 15, 2011), <http://online.wsj.com/article/SB10001424052702304521304576446191468181966.html?KEYWORDS=pentagon+hacking> (discussing how the Pentagon has been the target of cyberattacks); Eve Mitchell, *Banking by Smartphone Can Be Risky*, MERCURYNEWS.COM (Aug. 22, 2011, 4:25 AM), [http://www.mercurynews.com/business/ci\\_18702642](http://www.mercurynews.com/business/ci_18702642) (discussing the potential dangers of banking online along with examples of various online security breaches including the take down of the PlayStation network by hackers).

event of a disaster.<sup>73</sup>

Outside tampering with the stored property data would generally come in the form of a hacker breaching system security and altering the records in some way, but there are a number of other ways in which an e-recording system could also be breached.<sup>74</sup> An essential step to implementing an e-recording system in any jurisdiction is to create safeguards which make such attacks unlikely.<sup>75</sup> PRIA offers guidance to recorders on how to properly secure electronically recorded data.<sup>76</sup> Within the PRIA data security plan, there are three main areas in which security must be addressed.<sup>77</sup>

First, “the applicable threats and vulnerabilities that can lead to loss or damage as a result of security bre[a]ches” must be identified and understood.<sup>78</sup> Second, “policies, procedures, and technologies” that protect against those identified threats and strengthen vulnerabilities must be created and implemented.<sup>79</sup> Finally, a response plan must be developed that mitigates damage if a breach actually does take place.<sup>80</sup> Additionally, employee training on data security and confidentiality is vital to maintaining a secure system, but security concerns do not

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73. Just as with paper records, precautions must be taken to protect against destruction, especially in cases of a natural disasters. *See, e.g.*, Press Release, RecordFusion, *supra* note 24; STANFIELD, *supra* note 24.

74. Depending on the aims and capabilities of the hacker, it may be possible to simply edit content such as the owner’s name or to delete the record altogether. Either scenario creates the situation in which the legal owner of the property would not be the owner of record. While paper recording is technically subject to the same potential for alteration, given the controlled nature of the recording office with staff monitoring it would be very difficult for such a change to go unnoticed and uncorrected. *See, e.g.*, McCaney, *supra* note 72 (illustrating that once a hacker has gained total access to the system, he can alter it in any way he chooses, including playing the Michigan fight song after each vote).

75. Unfortunately, making hacking an impossibility appears itself to be an impossibility. Even the Pentagon has been unable thus far to fully protect its computer systems from outside threats. Barnes & Gorman, *supra* note 72.

76. PROP. RECS. INDUS. ASS’N., ELECTRONIC RECORDING SECURITY CONSIDERATIONS (2003), available at <http://www.pria.us/i4a/pages/index.cfm?pageID=3750> (files are in compressed .zip format and must be downloaded to view) [hereinafter PRIA SECURITY].

77. *Id.* at 3.

78. *Id.*

79. *Id.*

80. *Id.*

end after the electronic submission is completed.<sup>81</sup>

Record storage and duplication also raise practical considerations for implementing an e-recording system. Not only would these new e-recording systems require a great deal of upfront capital expenditures,<sup>82</sup> current records staff would need to receive training in the use of the system while additional employees may need to be hired to maintain the system.<sup>83</sup> An additional upfront cost would be the conversion of paper records, which in portions of the country may date back over two hundred years, into a digital format.<sup>84</sup> Upfront costs aside, however, a fully electronic recording system could actually lead to a long-term cost savings because it would require fewer staff persons to keep the system going and would lower data storage costs.

#### F. TORRENS AND E-CLOSINGS: THE FINAL FRONTIERS OF REAL ESTATE TRANSACTIONS?

E-recording is not the only avenue of change possible for real estate recording transactions. Two additional options offer the possibility of streamlining the whole process, Torrens and e-closings. Torrens is an entirely different type of recording system.<sup>85</sup> Traditional recording is a passive process in which the county recorder is only the keeper of the records.<sup>86</sup> In a Torrens

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81. *Id.* at 10 (“[D]ocuments and information can be stored temporarily as part of processing a recordable document from a submitter, stored long term in a local environment as part of an online repository of recorded documents and indices, and stored long term in a remote environment as part of an offline archive of recorded documents.”).

82. Costs may be defrayed by additional recording fees for documents recorded electronically. Forward, *supra* note 57. Additional fees could be justified to submitter for the convenience of e-recording as well the cost-savings associated with not having to mail the documents. *Id.*

83. PRIA SECURITY, *supra* note 76, at 3.

84. See, e.g., ACRIS: Online City Register, NYC.GOV, <http://www.nyc.gov/html/dof/html/jump/acris.shtml> (last visited Aug. 25, 2011) (noting that digital versions of property records are only available after 1966). It is also important to note the digitizing the old property records is not without its difficulties including legibility and searchability of the scanned documents. See, e.g., Jackson West, *Digitize All of Your Old Media*, WASH. POST (June 1, 2009, 12:19 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052800102.html> (discussing the difficulties of making older media into readable and searchable document); see also Gaudio, *supra* note 14 (discussing how real estate recording dates back to colonial times in the United States).

85. See generally R. G. Patton, *The Torrens System of Land Title Registration*, 19 MINN. L. REV. 519 (1934–35).

86. In the traditional real estate recording system, county recorders do

system, the recorder<sup>87</sup> not only maintains the property records, but validates that the registered interests are legitimate before placing them on the Torrens registry.<sup>88</sup> This makes title searching much simpler because the individual doing the search only needs to check a single registration document to identify what interests the property is subject to and to whom those interests belong.<sup>89</sup>

State and local governments take on additional liabilities when participating in a Torrens system.<sup>90</sup> Though a Torrens system ultimately leads to more stability of title within the jurisdiction, the government takes on the legal responsibility of ensuring that the registration of a particular property accurately reflects the state of title.<sup>91</sup> Mistakes in the registration record can result in injured parties suing the government for the damages incurred by relying on the flawed registration.<sup>92</sup> Staff must be trained thoroughly to limit these liabilities and ensure that the registration record is as accurate as possible.<sup>93</sup>

While Torrens affects the recording side of a real estate transaction, e-closings take advantage of both UETA and URPERA—creating a more efficient closing process for all parties involved including purchasers, sellers, lenders, and title

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not verify the authenticity of the documents recorded. *See, e.g.,* Patton, *supra* note 85, at 519–21 (discussing the distinctions between registration and recording). “The traditional American system involves neither governmental registration nor indemnity. It is merely a mechanism for publicly recording private transfers, leaving the parties to enforce their rights according to statutory and common law rules of priority.” Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 663 (2002–03).

87. Recorders are often called a registrar in Torrens jurisdictions. *Id.* at 671.

88. NELSON ET AL., *supra* note 4, at 235–38 (discussing Torrens systems generally); *see also* Patton, *supra* note 85, at 525.

89. Patton, *supra* note 85, at 526–27 (“The title shown by a certificate is at all times an adjudicated title.”).

90. “As one commentator said, the ‘certificate issued by the registrar is not simply a certificate, but an absolute guaranty of title by the Government.’ That guaranty is an assurance fund that will reimburse someone deprived of a property interest by a registration that incorrectly describes the property or wrongfully vests title in another.” Szypszak, *supra* note 86, at 672.

91. “Torrens system proponents boldly argue that registration ‘substitutes a better system of conveyancing, and, by granting indefeasibility of title, gives the land-owner absolute security.’” *Id.*

92. *Id.*

93. *Cf. id.*

agents.<sup>94</sup> Though many variations exist,<sup>95</sup> the basic concept behind e-closings is that any of the involved parties can sign the closing documents electronically.<sup>96</sup> The whole process can be completed remotely which can lead to savings of both time and money.<sup>97</sup> The electronically signed documents are then electronically submitted, recorded, and indexed by the recorder's office, if e-recording is available in that jurisdiction.<sup>98</sup>

#### G. SUMMARY

Slowly but surely, state legislatures across the country have begun to enact URPERA, paving the way for e-recording in these states. However, even among those states that have adopted URPERA, very few have taken the necessary steps to create a state-wide electronic recording system. Costs and a general distaste for change, along with security and logistical concerns, have made the transition to e-recording painfully slow. The advantages of allowing e-recording<sup>99</sup> far outweigh its potential risks. Recording jurisdictions and state legislators alike must be convinced that the initial costs of digital conversion are well worth the budgetary sacrifice because, once fully implemented, maintaining electronic property records is less costly and much more efficient.<sup>100</sup>

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94. See, e.g., Rich Vetstein, *Electronic Real Estate Closings (E-Closings): The Future of The Real Estate Closing Industry*, MASS. REAL EST. L. BLOG (Sept. 25, 2009), <http://www.massreal-estate-law-blog.com/electronic-real-estate-closings-e-closings-the-future-of-real-estate-closings> (describing the experience of a couple going through an e-closing).

95. *Id.*

96. This also means that closing documents can be transmitted electronically rather than using the postal service or faxes.

97. E-closing must include safeguards of its own to ensure that the parties signing electronically are legally able to do so in order to prevent data corruption in the final property record.

98. *ERecording*, *supra* note 70.

99. Ideally, states would begin to move to fully electronic recording systems, from submission to data storage, but the complete transition from paper records to electronic is an understandably long process. The first objective must be to make e-recording available in every American recording jurisdiction before moving to a solely electronic process. See *generally* PRIA SECURITY, *supra* note 76.

100. *Id.*

## II. ANALYSIS

## A. FAILURE TO LAUNCH: WHY MERS AND UETA DIDN'T MAKE IT INTO ORBIT

Some may argue the real estate recording in the United States is a classic case of “If it ain’t broke, don’t fix it.” After all, many of these systems have been in place for more than century and in some case two centuries.<sup>101</sup> Such claims would fail to touch on the obvious technological advances and greater pace of business that make paper-based recording outmoded in today’s market. MERS itself is an illustration of how the paper-based recording system frankly cannot accommodate its most frequent customers: mortgage lenders.<sup>102</sup> For better or worse, the secondary mortgage market has become an integral component of real estate transactions in the United States—meaning that any given mortgage loan may change hands a number of times before it reaches maturity and will require some method to document these changes in possession.<sup>103</sup> Recording gaps cause tension between the need to keep an accurate record of who or what entity holds an interest in the property and the market demand for quick sales without delay.<sup>104</sup> Interestingly enough, accuracy of the record of ownership is essential in either system, paper county property records or MERS data, because purchasers of a mortgage interest need to be sure that the seller actually holds the interest that is being sold.

MERS arrangement failed to be an adequate solution to the tortoise-like recording process for a number of reasons. First of all, MERS operates on questionable legal grounds because it is unclear whether MERS organization is allowed to bring a foreclosure action against a defaulting mortgagor.<sup>105</sup> Additionally, it is unclear if MERS should have ever been allowed to record a mortgage interest in the property when

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101. Gaudio, *supra* note 14.

102. See Dordan, *supra* note 7, at 181–82; *About MERS*, *supra* note 36.

103. See generally NELSON ET AL., *supra* note 4, at 483–542; Vasser, *supra* note 6; Dixon, *supra* note 35.

104. See sources Baum and Hill cited *supra* note 23; see also NELSON ET AL., *supra* note 4, at 483–542; Vasser, *supra* note 6; Dixon, *supra* note 35.

105. See, e.g., Lipscomb v. Mortg. Elec. Registration Sys., Inc., No. 1:11-CV-497 AWI JLT, 2011 WL 3361132 (E.D. Cal. Aug. 3, 2011); Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819 (Cal. Ct. App. 2011). *But see* Sacchi v. Mortg. Elec. Registration Sys., Inc., No. CV 11-1658 AHM CWX, 2011 WL 2533029 (C.D. Cal. June 24, 2011).

MERS was not the entity holding the mortgage interest or had any actual interest in the property for that matter.<sup>106</sup> The second reason for its lack of success is that MERS only solved recording issues on the side of the lender and did nothing to improve the process on the side of the property owner.

It also cannot be ignored that MERS has been targeted in media coverage of the economic downturn and the so-called foreclosure crisis.<sup>107</sup> Courts may very well decide that MERS as it stands today is completely valid with legal standing to bring foreclosure actions, but in the court of public opinion, MERS is unlikely to fare so well.<sup>108</sup> Public distrust for the system may make lenders hesitant to utilize the system as freely as they had in the past.<sup>109</sup> And without lenders, MERS ceases to exist.

If MERS is on its last leg, UETA skipped the race. UETA was drafted to accommodate the growing use of electronic contracting and make the resulting contracts as legally valid as their paper and ink counterparts.<sup>110</sup> It failed, however, to alter state recording acts to allow for the recording of electronically signed documents.<sup>111</sup> Recording is an important step in most real estate transactions that offers legal benefits to those who decide to record.<sup>112</sup> By failing to make recording of electronic real estate documents a legal possibility, UETA was simply left out of real estate transactions picture while electronic contracting took off in other areas—leaving the real estate world to its paper contracts and recording.<sup>113</sup>

URPERA was drafted in response to UETA shortcomings of allowing the use of electronic document in real estate transactions and then allowing the electronic documents to be fully recorded with the county.<sup>114</sup> The enactment of URPERA in the state legislature is a key step in the e-recording process, but it does not automatically make e-recording the sole means of re-

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106. Robinson, *supra* note 34, at 1625–26.

107. See *supra* note 40 and accompanying text.

108. Dash, *supra* note 7 (using Chase as an example of lenders turning away from the use of MERS in foreclosures).

109. *Id.*

110. Nat'l Conference of State Legislatures, *Electronic Transactions Act Summary*, <http://uniformlaws.org/ActSummary.aspx?title=Electronic%20Transactions%20Act> (last visited Aug. 27, 2011) [hereinafter *UETA Summary*].

111. Ewan, *supra* note 47, at 1497–98.

112. NELSON ET AL., *supra* note 4, at 204.

113. *URPERA Summary*, *supra* note 50.

114. *Id.*

ording.<sup>115</sup> Instead, it creates a system in which e-recording is legally valid and available, but does not eliminate the paper recording process already in place within that jurisdiction.<sup>116</sup> It also does not create the obligation to set up the necessary technological systems required for e-recording to be possible.<sup>117</sup>

URPERA addresses and overcomes the legal barriers to implementing an e-recording system, but it does nothing to actively speed implementation.<sup>118</sup> States have been slow to adopt and enact URPERA.<sup>119</sup> However, even in those states that have enacted URPERA as state law, very few have gone to the necessary lengths to build an infrastructure capable of handling a completely electronic recording system.<sup>120</sup> More than half of the nation's population remains unable to access e-recording and is left with a hodge-podge of short-term, ineffective solutions like MERS and UETA.<sup>121</sup>

Other options for change include a complete overhaul of the recording system by implementing a Torrens system for the recording jurisdiction. While the stability offered by the Torrens system is desirable, the additional liabilities held by the government may make it unappealing in many, if not most, recording jurisdictions.<sup>122</sup> Additionally, the pre-recording steps of the process could be simplified in the form of e-closings; however, without e-recording as a viable option, e-closings become less advantageous.<sup>123</sup> So where do we go from here?

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115. Pa. Ass'n of Notaries, *supra* note 56.

116. *Id.*

117. *Id.*; URPERA, *supra* note 11

118. URPERA, *supra* note 11, at Section IV ("Although this act does not require a recorder to implement electronic recording, it does not preclude the possibility that other state or local law might require a recorder to do so.")

119. See, e.g., Forward, *supra* note 57.

120. See Press Release, Prop. Recs. Indus. Ass'n, *supra* note 55 (noting that only Colorado has implemented a statewide electronic recording system).

121. *ERecording Population Coverage*, PROP. RECS. INDUS. ASS'N, (available to PRIA members, on file with author) (illustrating the percentage of the population by state with access to some form of e-recording); *supra* Part I(B).

122. See generally Szypszak, *supra* note 86, at 673–82.

123. See *supra* Part I(F).

B. WE CAN REBUILD IT, WE HAVE THE TECHNOLOGY. WE CAN MAKE IT BETTER THAN IT WAS. BETTER. STRONGER. FASTER.<sup>124</sup>

Improving the real estate recording system in the United States is no small task with nearly three thousand different recording jurisdictions representing wide variations in population density and available resources.<sup>125</sup> No one path to e-recording will be the right choice in every jurisdiction, but each path will share at least a few of the same milestones. First and foremost, URPERA or similar legislation must be enacted in order to make e-recording a legally valid option.<sup>126</sup> Without addressing the state's recording act limitations on recording, electronic contracting will remain outside of the real estate transactions world.<sup>127</sup> URPERA is just as ineffective as UETA if it is enacted without an actual implementation plan for creating an e-recording system.<sup>128</sup>

Implementation will likely be a gradual process. Simply allowing the electronic submission of documents to be recorded would go a long way towards making the process more convenient for submitters, but does little to address the actual problems with paper-based recording.<sup>129</sup> The gap in recording would still remain, as would the potential problems with paper indexing, recording, and filing, including misplaced documents and the greater potential for physical destruction.<sup>130</sup> Fully electronic recording in which documents are submitted electronically, indexed electronically, and stored electronically resolves most of these problems.<sup>131</sup>

Fully electronic recording is not a problem free solution, however. Additional safeguards must be in place to make the e-recording system and its data as secure as possible. Heeding the PRIA approach to data security in the e-recording realm

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124. See *The Six Million Dollar Man*, IMDB, <http://www.imdb.com/title/tt0071054/> (last visited Aug. 27, 2011) (noting the opening sequence of the television series in which technology is used to completely rebuild a severely injured man).

125. See *Overview of County Government*, *supra* note 54.

126. See Ewan, *supra* note 47, at 1503–05.

127. *Id.*

128. See, e.g., Pa. Ass'n of Notaries, *supra* note 56; Forward, *supra* note 57.

129. MODELS OF ERECORDING, *supra* note 61, at 2–3 (specifically the discussion of e-recording model 1).

130. See *supra* Part I(A).

131. Electronic indexing and storage is found in more complex and sophisticated e-recording systems. MODELS OF ERECORDING, *supra* note 61, at 2–3, 6–7.

makes threats of outside data manipulation rather unlikely and allows for data damage control in the event that security breach does occur.<sup>132</sup> Another difficulty with e-recording would be its reliance on electricity; in the event of a power outage, records could not be viewed or recorded, as the whole process would come to a halt until power was restored.<sup>133</sup> This, however, could be handled with the use of backup generators to supply electricity in case of emergency.<sup>134</sup>

Staffing and funding concerns make the initial implementation of an e-recording system difficult as well.<sup>135</sup> Staff would need to be trained on an entirely new system or new staff members would have to be hired to handle the e-recording side of the office.<sup>136</sup> New equipment would need to be purchased to accept electronic record submissions and then store them after being officially recorded.<sup>137</sup> Finally, a method for digitizing the old paper records must be created that preserves the content of the record accurately while making that content compatible with automated electronic indexing processes.<sup>138</sup>

The ability to electronically index and search documents would make the entire recording process more user-friendly.<sup>139</sup> Title searches could be conducted more efficiently with the searcher having only to gather electronic documents through a search of the property records database.<sup>140</sup> The possibility of a

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132. PRIA SECURITY, *supra* note 76, at 15–18 (PRIA advocates a data security plan which includes identification of problems, policies and procedures to limit known problems, and a response plan to minimize damage if a breach occurs.).

133. It is important to note that a power outage is less a concern of data security and more of an issue of data availability.

134. In the event of a power outage, paper records would also be difficult to utilize. Power dependence in and of itself should not dissuade the implementation of an e-recording system.

135. Burkhart, *supra* note 71.

136. *Id.*

137. PRIA SECURITY, *supra* note 76, at 10 (addressing specifically the electronic storage needs after accepting an electronic submission).

138. West, *supra* note 84.

139. MODELS OF ERECORDING, *supra* note 61, at 2–3. By moving to the more advanced levels of the e-recording continuum, less human involvement is required to record and index a document. *Id.* However, the pre-recording legwork such as ensuring that the electronic document is properly formatted to be read by the system may make implementing such an advanced e-recording system more difficult on the submitter side. *Id.*

140. *Id.* An e-recording title search is still more complex and prone to errors than a Torrens search which requires only a review of the title registra-

lost deed would also decrease because even if improperly indexed, the document could still be found by searching the database.<sup>141</sup> Time saved by e-recording could also greatly reduce the gap period and the potential for harm such delays cause.<sup>142</sup> Done correctly, a fully electronic recording system that is secure and easily searchable not only makes that recording process simpler, but it can create more stability of title within that recording jurisdiction by making thorough title searches easier to conduct in order to establish what interests in the property are being held and by whom.

### III. CONCLUSION

Half of the American population and nearly three quarters of the nation's counties do not have e-recording in any form.<sup>143</sup> Here, paper-based real estate recording remains the only means to record a property interest and receive the associated recording act benefits.<sup>144</sup> Paper-based recording is a slow, multi-step process.<sup>145</sup> It is subject to a number of potential failures, including misindexed or misfiled documents and physical destruction in the event of a natural disaster.<sup>146</sup>

Traditional paper recording was unable to keep up with the growing demands of secondary mortgage market buyers because of the delay in time between document submission and official recording, the infamous gap.<sup>147</sup> State recording acts prohibited the recording of electronic and electronically signed documents—making UETA ineffective at bringing about change in real estate recording practices.<sup>148</sup> URPERA sought to

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tion. *See, e.g.*, Szypszak, *supra* note 86, at 672.

141. MODELS OF ERECORDING, *supra* note 61 (discussing forms of e-recording which include searchable documents).

142. *See* Hill, *supra* note 23; Baum, *supra* note 23.

143. *See ERecording Population Coverage*, PROP. RECS. INDUS. ASS'N, (available to PRIA members, on file with author) (illustrating the percentage of the population by state with access to some form of e-recording); *ERecording Jurisdictions*, PROP. RECS. INDUS. ASS'N, (available to PRIA members, on file with author) (illustrating the number of counties by state with some form of e-recording).

144. NELSON ET AL., *supra* note 4, at 204.

145. *ERecording*, *supra* note 70 (comparing the many steps involved in paper submissions as opposed to electronic submissions of documents to be recorded).

146. *See supra* Part I(A).

147. Dordan, *supra* note 7.

148. Ewan, *supra* note 47.

make electronic recording a legal reality, but has been slow to catch on with a number of state legislatures.<sup>149</sup>

While UETA failed to change real estate recording because it left state recording acts untouched, MERS failed because it sought to bypass county-level recording altogether.<sup>150</sup> Despite public displeasure towards MERS, actual implementation of e-recording systems has been sluggish even in those states where URPERA has been enacted.<sup>151</sup> The enactment of URPERA is the first step on the path to a fully electronic recording system, but enactment alone is nothing without implementation.<sup>152</sup> PRIA offers guidance on how to implement e-recording with a continuum of e-recording models that range from simple acceptance of electronic document submission to a nearly fully automated electronic process with computer indexing, searching, and storage.<sup>153</sup> Our first stop may have been URPERA, but our ultimate destination must be a fully electronic recording system from submission to recording and indexing to document storage.

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149. *URPERA Summary*, *supra* note 50.

150. *See* Ewan, *supra* note 47; Dordan, *supra* note 7; Robinson, *supra* note 34, at 1621–25; *About MERS*, *supra* note 36. Additionally, MERS was built on legally shaky ground and has been a party to a number of cases challenging its ability to initiate foreclosure proceedings. *see generally* Lipscomb v. Mortg. Elec. Registration Sys., Inc., No. 1:11-CV-497 AWI JLT, 2011 WL 3361132 (E.D. Cal. Aug. 3, 2011); *Gomes v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 3d 819 (Cal. Ct. App. 2011). *But see*, *Sacchi v. Mortg. Elec. Registration Sys., Inc.*, No. CV 11-1658 AHM (CWx), 2011 WL 2533029 (C.D. Cal. June 24, 2011).

151. Forward, *supra* note 57. *See also*, *ERecording Population Coverage*, PROP. RECS. INDUS. ASS'N, (available to PRIA members, on file with author) (illustrating the percentage of the population by state with access to some form of e-recording); *ERecording Jurisdictions*, PROP. RECS. INDUS. ASS'N, (available to PRIA members, on file with author) (illustrating the number of counties by state with some form of e-recording).

152. URPERA enactment simply gives state officials the option to allow e-recording, not an obligation to do so. Pa. Ass'n of Notaries, *supra* note 56.

153. MODELS OF ERECORDING, *supra* note 61, at 2–3.