



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2017-7]

Modernizing Copyright Recordation

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Interim rule.

SUMMARY: The United States Copyright Office is issuing an interim rule amending its regulations governing recordation of transfers of copyright ownership, other documents pertaining to a copyright, and notices of termination. The interim rule adopts a number of the regulatory updates proposed in the notice of proposed rulemaking published on May 18, 2017.

DATES: Effective December 18, 2017.

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SUPPLEMENTARY INFORMATION:

I. Background

Under the Copyright Act of 1976, the U.S. Copyright Office is responsible for recording documents pertaining to works under copyright, such as assignments, licenses,

and grants of security interests.¹ The Office is also responsible for recording notices of termination.² As discussed in a notice of proposed rulemaking published in the Federal Register on May 18, 2017 (“NPRM”),³ the current recordation process is a time-consuming and labor-intensive paper-based one, requiring remitters to submit their documents in hard copy.

The Office is engaged in an effort to modernize the recordation process in coming years by developing a fully electronic, online system through which remitters will be able to submit their documents and all applicable indexing information to the Office for recordation. In conjunction with the anticipated development effort, the Office issued the NPRM to propose updates to the Office’s current regulations to govern the submission of documents to the Office for recordation once the new electronic system is developed and launched. The NPRM explained that while the Office could not estimate when the new system would be completed, public comments were being sought because the Office needed to make a number of policy decisions critical to the design of the to-be-developed system.⁴

In addition, as most relevant here, the NPRM further stated that while the proposed amendments were designed with a new electronic submission system in mind, at least some of the proposed changes could be implemented in the near future, without the new system. Thus, the Office noted that, to the extent possible under the Office’s

¹ 17 U.S.C. 205.

² A “notice of termination” is a notice that terminates a grant to a third party of a copyright in a work or any rights under a copyright. Only certain grants may be terminated, and only in certain circumstances. Termination is governed by three separate provisions of the Copyright Act, with the relevant one depending on a number of factors, including when the grant was made, who executed it, and when copyright was originally secured for the work. *See* 17 U.S.C. 203, 304(c), 304(d).

³ 82 FR 22771 (May 18, 2017).

⁴ *Id.* at 22771.

current paper system, the Office intended to adopt some aspects of the proposed rule on an interim basis until such time as the electronic system is complete and a final rule is enacted.⁵

II. Interim Rule

As indicated in the NPRM, this interim rule adopts those provisions described in the NPRM that the Office believes will help streamline the recordation process prior to completion of the new electronic recordation system.

Unlike a typical interim rule, this one is being promulgated following a notice of proposed rulemaking and a period for public comment. In response to the NPRM, the Office received thirteen comments from a variety of stakeholders.⁶ As this interim rule does not cover every issue raised by the NPRM or the commenters, the Office reserves judgment on any matters not expressly discussed herein and no inference should be drawn from the Office's silence on any particular point. Additionally, the Office reserves the right to issue other interim rules during the course of developing the system. The comments received in response to the NPRM not addressed by this interim rule will continue to be evaluated by the Office as system development progresses. The Office intends to issue a final rule under this same rulemaking docket in connection with the public release of the new system.

While some discrete aspects of the proposed rule were opposed, most were either unopposed or affirmatively supported. As such, except as otherwise discussed below, the

⁵ *Id.* at 22771–72.

⁶ The commenters are Author Services, Inc., Authors Alliance, Copyright Alliance, CSC, Dale Adams, Entertainment Software Association (“ESA”), Intellectual Property Owners Association, Kernochan Center for Law, Media and the Arts (“Kernochan”), Motion Picture Association of America, Inc. (“MPAA”), “Music Parties” (joint comment by American Association of Independent Music, Recording Industry Association of America, Inc., and National Music Publishers’ Association), Music Reports, Inc. (“MRI”); Sergey Vernyuk, and Software and Information Industry Association (“SIIA”).

proposed rule is being adopted largely for the reasons discussed in the NPRM.⁷ As stated in the NPRM, the general mechanics of the new regulations are essentially the same as under the Office’s current rules and policies.⁸ To be eligible for recordation, the document or notice of termination must satisfy certain requirements, be submitted properly, and be accompanied by the applicable fee. As before, the date of recordation will be the date when all of the required elements are received by the Office, and the Office may reject any document or notice submitted for recordation that fails to comply with the statute or the Office’s rules or instructions. While recordation of section 205 documents is optional, pursuant to statute, notices of termination must be recorded with the Office “as a condition to its taking effect.”⁹

A. Transfers of Copyright Ownership and Other Documents Pertaining to a Copyright

Cover Sheet and Electronic Title Lists. As was proposed,¹⁰ the interim rule requires paper submissions to be accompanied by a cover sheet that is similar to the current Form DCS. In addition to the information currently collected, the new Form DCS asks for some minor additional indexing information and has some additional checkboxes to help with the document examination process. Additionally, the various required certifications discussed below can also be made using Form DCS. Having all of this information in one place will benefit remitters by aiding them in confirming that their submissions are complete and comply with the requirements for recordation. It should also benefit the Office by making the examination process more efficient, as examiners

⁷ See generally 82 FR 22771.

⁸ See *id.* at 22772, 22776.

⁹ 17 U.S.C. 203(a)(4)(A), 304(c)(4)(A), 304(d)(1).

¹⁰ 82 FR at 22772.

will no longer need to search through the document itself to find this indexing information.

Also as proposed,¹¹ remitters may continue to provide electronic lists of certain indexing information about the works to which the document pertains. As the NPRM discussed, much of the current regulation's details surrounding the formatting of electronic title lists are being removed. Instead, the interim rule states that such lists must be prepared and submitted in the manner specified by the Office in instructions it will post on its website. This change will allow the Office to develop more flexible instructions for remitters that can be updated and modified as needed without resorting to a rulemaking. No commenter objected to this proposed change.

Originals, Copies, and Actual Signatures. One of the more significant proposals the Office made in the NPRM dealt with the treatment of original documents versus copies, and the definition of "actual signature."¹² The Office proposed to continue requiring, in accordance with section 205(a), that to record a document, remitters must submit either the original document "bear[ing] the actual signature of the person who executed it" or a "true copy of the original, signed document" accompanied by a "sworn or official certification." In discussing the application of the statute to electronic documents and electronic signatures, the NPRM proposed that to avoid any doubt about the sufficiency of a recordation on the basis of whether or not the submitted document is an original or a copy, the Office would consider any document either submitted electronically through the new system, or lacking a handwritten, wet signature (*e.g.*, any document bearing an electronic signature) to be a "copy" within the meaning of section

¹¹ *Id.*

¹² *Id.* at 22772-74.

205.¹³ The Office noted that, in practice, this would be unlikely to significantly affect remitters, as the only consequence is that each such submission would need to be accompanied by a sworn or official certification. As no commenter objected, the Office is adopting this as part of the interim rule, to the extent applicable to the current paper-based submission process.

The NPRM also proposed a definition of the statutory term “actual signature.”¹⁴ As discussed in the NPRM, that term has been undefined in the Office’s regulations, but in practice, the Office has required original documents to bear handwritten, wet signatures and copies of documents to reproduce such handwritten, wet signatures. Electronic signatures have not been permitted. After analyzing the issue, the Office concluded that its regulations and processes should be flexible enough to permit any document that may constitute a transfer of copyright ownership under section 204 of the Copyright Act to be recordable under section 205. Thus, the Office proposed defining “actual signature” as any legally binding signature, including an electronic signature as defined by the E-Sign Act.¹⁵

In connection with this proposal, the Office explained that it disagreed with the suggestion from Professor Brauneis’s report, *Transforming Document Recordation at the United States Copyright Office*, that the signature be in a “discrete and identifiable form”

¹³ *Id.* at 22772–73.

¹⁴ *Id.* at 22773.

¹⁵ *Id.* The E-Sign Act defines “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. 7006(5). While Copyright Alliance and MPAA supported this proposed definition, they asked that the Office not create any requirements above and beyond what is required in the E-Sign Act. *See* Copyright Alliance Comments at 2; MPAA Comments at 2. The interim rule adopts the very broad definition of “any legally binding signature” and merely refers to the E-Sign Act as an example of something that would be included within that definition. The Office did not mean to imply that the various requirements applicable to the E-Sign Act were being imported into the Office’s new definition of “actual signature.”

on the remitted document.¹⁶ Instead, the Office proposed resolving in another way Professor Brauneis’s concern that having too broad a definition could potentially include “acts that do not generate a trace that is easily remitted as ‘a signature’ on ‘a document.’”¹⁷ The Office proposed that rather than restrict the definition of signature, the rule should require that where an actual signature is not a handwritten or typewritten name, such as when an individual clicks a button on a website or application to indicate agreement to contractual terms, the remitter should be required to submit evidence demonstrating the existence of the signature, such as by appending a database entry or confirmation email to a copy of the terms showing that a particular user agreed to them by clicking “yes” on a particular date.¹⁸

To the extent discussed by commenters, the Office’s proposal on these issues was largely supported.¹⁹ One commenter, however, took issue with the Office’s proposal not to limit signatures to those in a “discrete and identifiable form” on the remitted document.²⁰ That commenter stated that the text of sections 204 and 205 contain materially different requirements and that, while in section 204, Congress adopted a more flexible writing requirement that would ultimately be tested in an adversarial environment, in section 205, Congress was narrower to create more certainty that if the requirements are met one would receive the enumerated benefits of recordation.²¹ The

¹⁶ 82 FR at 22773 (quoting ROBERT BRAUNEIS, TRANSFORMING DOCUMENT RECORDATION AT THE U.S. COPYRIGHT OFFICE 66 (Dec. 2014), <https://www.copyright.gov/docs/recordation/recordation-report.pdf> [hereinafter *Brauneis Report*]).

¹⁷ 82 FR at 22773 (quoting *Brauneis Report* at 66).

¹⁸ *Id.* at 22773.

¹⁹ See Copyright Alliance Comments at 2; MPAA Comments at 2; Music Parties Comments at 4; Sergey Vernyuk Comments.

²⁰ SIIA Comments at 2–5.

²¹ *Id.* at 4.

commenter contended that the result of the proposed rule would be that the scope of section 205 would be improperly subsumed by section 204 (and vice versa).²²

The Office disagrees. Section 204 describes what is necessary for a transfer of copyright ownership to be valid and section 205 states explicitly that “[a]ny transfer of copyright ownership . . . may be recorded.”²³ Thus, any transfer that is valid under section 204 should be recordable under section 205.²⁴ As explained in the NPRM, the recordation requirement of an “actual signature” merely distinguishes the signature on the original document from the reproduction of that signature on a copy of the document, and is not meant to limit the type of signature a document must have in order to be recorded.²⁵

Accordingly the Office’s interim rule essentially adopts the approach set forth in the NPRM, including the definition of “actual signature” as proposed. The interim rule provides that where a signature is not a handwritten or typewritten name, to be recordable, the remitter must provide a description of the nature of the signature and whatever evidence is necessary to demonstrate the existence of the signature. At the same time, the Office recognizes that, in the case of signatures that are not discrete and identifiable, it may prove difficult in practice for recordation examiners to determine on a case-by-case basis whether a document has been actually signed. Thus, the Office will not evaluate the

²² *Id.* at 5.

²³ *See* 17 U.S.C. 204, 205.

²⁴ *See* REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 95–96 (Comm. Print. 1961) (in recommending that what would become the current Copyright Act “require explicitly that any instrument filed for recordation bear the actual signature of the person executing it or a sworn or official certification that it is a true copy of the original signed instrument”—which closely resembles the current text of section 205(a)—the report makes clear that the original intent was that “the recordation system should embrace all instruments by which the ownership of a copyright is transferred in whole or in part”).

²⁵ *See* 82 FR at 22773–74; *see also* REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 96 (Comm. Print. 1961) (explaining that the reason for requiring an “actual signature” is because “[t]here should be practical assurance that the instrument recorded is precisely the same as the one executed”).

evidence submitted in such cases, but will presume that the signature requirement has been satisfied and record the document (if all other requirements for recordation have been met). The Office will also make any of the ancillary material submitted available for public inspection. The interim rule makes clear, however, that this presumption is without prejudice to any party claiming that the document was not signed, including in court.

Certifications. Given the general lack of opposition to the proposed rule's various certification requirements, they are being adopted for the reasons provided in the NPRM, except as noted below.²⁶ Thus, under the interim rule, remitters are required to provide essentially two sets of certifications. First, the remitter must personally certify that he or she has appropriate authority to submit the document for recordation and that the indexing and other information submitted to the Office by the remitter is true, accurate, and complete to the best of the remitter's knowledge. These remitter-related certifications concern the remitter's authority to make the recordation and the veracity of the indexing and other information provided as a part of the submission; the certifications do not pertain to the actual document being submitted for recordation. The remitter can make these certifications by signing, either electronically or by hand, the required cover sheet.

Second, the interim rule requires certifications related to the document itself: that the actual document being submitted for recordation conforms to the Office's signature,²⁷ completeness, legibility, and redaction rules and, where the document is a copy, that it be

²⁶ See 82 FR at 22774.

²⁷ While the proposed rule did not specifically include a certification concerning the signature, the Office believes that having one will aid the Office's examination just as much as the other proposed certifications, especially in light of the adopted definition of "actual signature."

accompanied by an official or sworn certification.²⁸ These document-related certifications generally can be made by either the remitter or another individual on the cover sheet submitted with the document to the Office.²⁹ An official certification, however, would need to be attached separately.

While one commenter voiced concerns that having two sets of certifications that can be made by different individuals could be confusing and burdensome,³⁰ the Office believes the commenter may have misunderstood the Office's proposed approach. The commenter asked that the Office allow a single representative to make both sets of certifications.³¹ That is exactly what the Office intended. Where a single person is in a position to make both the remitter-related and document-related certifications, he or she can make them all on the document cover sheet submitted with the document to the Office. The Office's rules permit different people to make the two sets of certifications simply to provide more flexibility to parties in the event, for example, the person filling out the document cover sheet and remitting the document is not in a position to make the document-related certifications (*e.g.*, if the remitter is a paralegal or an administrative assistant without knowledge of the underlying document). Only in that case would two individuals be making the separate certifications. And even in that case, the remitter would still sign the document cover sheet for the remitter-related certifications; the other

²⁸ The interim rule does not substantively alter the definition of "official certification," but clarifies that it can be signed electronically. The interim rule does, however, simplify the definition of "sworn certification," as was proposed, 82 FR at 22774, while also making the same clarification regarding electronic signatures.

²⁹ Commenters affirmatively supported having pre-printed certifications. *See* Authors Alliance Comments at 5; Sergey Vernyuk Comments. They also supported allowing a sworn certification to be made to the best of the certifier's knowledge. *See* Authors Alliance Comments at 5; Sergey Vernyuk Comments; *see also* 82 FR at 22774.

³⁰ Music Parties Comments at 4.

³¹ *Id.*

individual would make the document-related certifications on a separate page of the cover sheet.

As to the Office’s proposed expansion of the categories of people who can make a sworn certification to include any person having an interest in a copyright to which the document pertains, as well as such person’s authorized representative, one commenter partially objected. The commenter agreed that successors-in-interest to the original parties and their representatives should be permitted, but took issue with permitting third-party beneficiaries to make the certification, voicing concerns of fraud and/or error by those who mistakenly believe or fraudulently represent themselves as deriving some incidental benefit from a document to be recorded.³² On further reflection, the Office believes that including third-party beneficiaries is not necessary. The main impetus for the expansion was to cover the types of scenarios noted by the Brauneis Report,³³ which would be covered by successors-in-interest.³⁴ As was originally proposed,³⁵ the Office is requiring that any authorized representative specify who they represent and that successors-in-interest briefly describe the nature of their relationship to the document or the original parties to the document.³⁶

Completeness and Legibility. In response to the NPRM’s proposal on completeness and legibility, the Office received a technical suggestion on the provision’s

³² *Id.*

³³ See 82 FR at 22774.

³⁴ See *Brauneis Report* at 67 (providing examples of wills where the testator is deceased and documents in the current owner’s chain of title but which were executed by predecessors-in-interest). While one commenter voiced support for the proposed rule, third-party beneficiaries were not specifically discussed. See *Authors Alliance Comments* at 5.

³⁵ 82 FR at 22774–75.

³⁶ See *Music Parties Comments* at 4 (recommending that successors-in-interest “describe their relationship to the document or to the signatories to the document”).

wording that the Office agrees with.³⁷ Thus, as under current regulations, the Office will continue to require documents submitted for recordation to be complete and legible. But as the NPRM proposed, the completeness requirement is being simplified to mandate that, while the document must be complete by its terms, it need only include referenced schedules, appendices, exhibits, addenda, or other material essential to understanding the *copyright-related* aspects of the document.³⁸ This is a change from current practice, where the Office requires documents to include all schedules, or provide an explanation for why such material cannot be provided. Thus, under the interim rule, if, for example, a document has several schedules, but only one has any relevance to the copyright-related terms of the agreement, the document would be deemed complete so long as that schedule is included; the other schedules can be omitted. The Office sees no reason to burden remitters with having to submit, and Office staff with reviewing, what can often be a significant volume of material completely unrelated to the copyright terms of the document.

Redactions. The NPRM proposed adopting rules governing redactions of documents, generally limiting redactions to certain enumerated categories of sensitive information, including financial, trade secret, and personally identifiable information.³⁹ The NPRM further proposed allowing remitters to request in writing the ability to redact other information from a document, which the Office may permit at its discretion. The proposal also required that blank or blocked-out portions of the document be labeled “redacted” or an equivalent; that all portions of the document required by the simplified

³⁷ See MPAA Comments at 6.

³⁸ 82 FR at 22775.

³⁹ *Id.*

completeness requirement be included (even if an entire page is redacted); and that upon request, for review purposes, the remitter may be required to supply the Office with an unredacted copy of the document or additional information about the redactions. Most commenters discussing redactions took issue with this last requirement to provide the Office with an unredacted copy of the document or additional information about the redactions, voicing serious security, privacy, and confidentiality concerns with the Office receiving, having access to, and storing such sensitive materials.⁴⁰ While one commenter did support the proposal,⁴¹ the Office has decided to not include this part of the provision in the interim rule, especially given that the Office was unlikely to require such information in the majority of cases. The Office cautions, however, that, as commenters pointed out, over-redacting a document may affect constructive notice under section 205(c).⁴²

Additionally, one commenter also asked that if an unredacted document is submitted accidentally that there be a simple process to replace it with a properly redacted one.⁴³ This would essentially be a type of correction. As such, the Office will more fully consider it in connection with its evaluation of the final rule on treatment of corrections going forward (see *Correcting Errors* below). The same commenter also suggested that the Office add more flexibility to the proposed rule by adding the phrase “other similarly sensitive information” to the acceptable categories of redactable

⁴⁰ See Copyright Alliance Comments at 3; ESA Comments at 4; MPAA Comments at 4; Music Parties Comments at 4–5.

⁴¹ See Kernochan Comments at 2 (“[A]ll material should be made available to the USCO if the USCO so requests.”).

⁴² See ESA Comments at 4 (noting that “remitters are motivated by Section 205(c) not to redact information relevant to the purposes of recordation”); Music Parties Comments at 4–5 (“Section 205(c) . . . provides a strong incentive for remitters to redact only material that is irrelevant to the purposes of recordation.”).

⁴³ MPAA Comments at 4.

information.⁴⁴ The Office declines to adopt this suggestion at this time. Other commenters agreed with the proposed categories, and the ability to make a written request to redact other information should provide an adequate mechanism through which remitters can seek additional redactions without having a catch-all provision.⁴⁵ The Office, however, will evaluate whether it is regularly receiving written requests to redact additional categories of information as part of the interim rule, and take that into account when formulating the final rule.

English Language Requirement. In the NPRM, the Office proposed to continue accepting and recording non-English language documents only if accompanied by an English translation signed by the individual making the translation.⁴⁶ The Office further proposed to extend the translation requirement to any indexing information provided by the remitter. Because the Office did not receive any objections to this aspect of the proposed rule, and one commenter affirmatively supported it,⁴⁷ it is being adopted as part of the interim rule. One commenter did, however, ask the Office to also permit translations made by software or automated translation services.⁴⁸ The Office agrees, and has included such a provision in the interim rule. This adjustment should make it easier and less costly to provide a translation. As to any concerns about accuracy, the Office

⁴⁴ *Id.*

⁴⁵ See ESA Comments at 4 (“[T]his rule generally provides an appropriate framework for addressing cases where a document contains sensitive information.”); MRI Comments at 5 (“These data categories are appropriate for redaction.”); Music Parties Comments at 4 (“We generally agree with the proposed approach to redactions. Allowing financial, trade secret and personally identifiable information to be redacted as of right and other information to be redacted at the discretion of the Office should meet the needs of remitters.”).

⁴⁶ 82 FR at 22775.

⁴⁷ See Sergey Vernyuk Comments.

⁴⁸ See Copyright Alliance Comments at 3.

notes that it may reject a translation if it is unintelligible, whether made by a person or through the use of software or automated service.

The Office would also like to clarify that even though the translation requirement is being expanded to indexing information, the Office does not intend to change its current practices concerning non-English titles of works at this time. If a non-English title of a work is natively spelled using only the letters, numbers, and printable characters that appear in the ASCII 128-character set (the character set the Office's current systems are limited to), a translation need not be provided, and if one is, the Office will index both the English and non-English titles of the work. If a non-English title is spelled using characters outside that character set (for example, it is in French but has accented letters, or is in Japanese), a transliteration using the ASCII 128-character set may be provided instead of or in addition to a literal translation. Where both a translation and transliteration are provided, both will be indexed as related titles.

Constructive Notice. The proposed rule sought to make clear that for constructive notice under 17 U.S.C. 205(c) to attach with regard to works to which a recorded document pertains, the document must include or be accompanied by the title *and* copyright registration number of each such work.⁴⁹ The Office received several comments objecting to the proposed rule on the ground that it is inconsistent with the statute, which they contended only requires that a title *or* registration number be provided for constructive notice to attach.⁵⁰ The Office is continuing to evaluate its proposal and these comments, including by closely examining the relevant legislative history to better

⁴⁹ 82 FR at 22776.

⁵⁰ See Author Services Comments at 1; Copyright Alliance Comments at 4–5; ESA Comments at 4–5; MPAA Comments at 4–6; Music Parties Comments at 7; SIIA Comments at 5–6.

discern the intent behind the statutory provision. For now, the Office declines to adopt a rule interpreting section 205(c). Nothing should be inferred from the Office's proposed provision or the Office's decision not to adopt a rule at this time.

B. Notices of Termination

Commenters did not object to any of the proposed submission requirements or procedures for recording notices of termination, and the proposals have largely been adopted. As the NPRM discussed, the requirements governing what must be submitted to the Office to record a notice of termination are remaining essentially unchanged.⁵¹ Thus, under the interim rule, as under the pre-existing rule, remitters are required to provide a complete and legible copy of the signed notice of termination as served on the grantee or successor-in-title. If separate copies of the same notice were served on more than one grantee or successor, only one copy needs to be submitted to the Office for recordation. The interim rule also maintains the requirement that remitters submit a statement setting forth the date on which the notice was served and the manner of service, unless that information is already contained within the notice itself. The interim rule also makes clear that, as previously, where service was made by first class mail, the date of service is the day the notice was deposited with the post office. The Office's timeliness rule also remains unchanged, and the Office will continue to refuse notices if they are untimely. Such scenarios where a notice would be deemed untimely include when the effective date of termination does not fall within the five-year period described in section 203(a)(3) or section 304(c)(3), as applicable, the documents submitted indicate that the notice was

⁵¹ 82 FR at 22776–77.

served less than two or more than ten years before the effective date of termination, and the date of recordation is after the effective date of termination.

As proposed,⁵² the interim rule clarifies that however the notice is signed, what must be submitted to the Office for recordation is a copy of the as-served notice, including the reproduced image of the signature as it appeared on that served notice. The interim rule also adds new certification requirements, as had also been proposed.⁵³ Lastly, as the NPRM discussed,⁵⁴ remitters are now required to include a cover sheet with any notice of termination submitted for recordation. This Recordation Notice of Termination Cover Sheet (“Form TCS”) is similar to and serves the same function as Form DCS does for section 205 document submissions. Form TCS asks for information about the remitter and for certain indexing information. It also includes a space for the remitter to provide a statement of service and make the required certifications.

C. Correcting Errors

In the NPRM, the Office indicated that it was inclined to continue its current general practice of not permitting corrections to be made for any remitter-caused inaccuracies after the document or notice is recorded.⁵⁵ Instead, the Office proposed that, as is the current practice, the remitter would need to resubmit the document or notice for recordation with corrected information and it would be treated as any other first-time-submission. For purposes of uniformity and efficiency, the NPRM proposed discontinuing permitting corrections for inaccurate electronic title lists that accompany

⁵² *Id.*

⁵³ *Id.* at 22777.

⁵⁴ *Id.*

⁵⁵ *Id.* at 22776, 22777.

paper filings.⁵⁶ The Office explained that such errors should be treated the same as those made on the cover sheet or through the new electronic system. Lastly, the NPRM concluded that to have an efficient recordation system with an affordable fee, it would simply be impractical for Office staff to review all remitter-provided indexing information, which also means that it would be very difficult to review “corrected” submissions against the original to confirm that the remitter is not attempting to do something improper under the guise of a correction.⁵⁷

The Office received comments asking that corrections be permitted under various circumstances.⁵⁸ The Office is still evaluating these comments and has not yet made a decision on this issue. For purposes of the interim rule, the Office is not changing the status quo for correcting information after a recordation has been completed. As a result, a slightly modified version of the current provision permitting corrections for electronic title lists has been retained. Mirroring the interim rule’s approach to preparing and submitting electronic title lists, the interim rule also omits the current instructions that detail how to submit a corrective filing and instead states that a correction concerning an electronic title list may be requested by following the instructions provided by the Office on its website.

D. Consequences of Inaccuracies

In the NPRM, the Office said that it intended to continue its current practice of relying on the information provided by remitters for indexing purposes and requiring parties-in-interest to bear the consequences of any inaccuracies in such remitter-provided

⁵⁶ *Id.* at 22776.

⁵⁷ *Id.*

⁵⁸ See Copyright Alliance Comments at 3; ESA Comments at 5–6; MPAA Comments at 4; Music Parties Comments at 3, 5–6.

information.⁵⁹ The NPRM also clarified that it is not necessarily always the remitter who bears the consequences of inaccuracies, but rather, more accurately, it is the parties in interest to the remitted document or notice of termination who bear the consequences, if any, of any inaccuracies in the information provided to the Office by the remitter.

Based on the comments received, the Office has decided to eliminate the part of the proposed rule stating that parties-in-interest to a document or notice bear the consequences, if any, of any inaccuracies in the information the remitter provides to the Office. In response to the NPRM, some commenters expressed confusion over who really bears the consequences in the notice of termination context, while another commenter pointed out that non-parties may also bear the consequences if they rely to their detriment on incomplete or inaccurate recordation information.⁶⁰ The Office did not intend for the proposed rule to be an assignment of risk or responsibility to a particular party to a transaction, but merely meant to make clear that the *Copyright Office* bears no responsibility for errors caused by a remitter. To avoid any confusion, the Office has removed the provision. But, to be clear, the Office bears no responsibility or liability if a remitter provides inaccurate indexing information that is then relied upon by the Office in indexing the document.

One commenter also asked that the Office adopt a rule stating that when a non-party relies to its detriment on incomplete or inaccurate recordation records, it should

⁵⁹ 82 FR at 22775–76.

⁶⁰ See ESA Comments at 6; MRI Comments at 4–5; Music Parties Comments at 7. Another commenter added that the proposed modification would seem to place the burden on any and every party to a document to regularly and continually check the Office’s records to ensure no one has submitted inaccurate information. Sergey Vernyuk Comments.

constitute evidence that any resulting infringement was not willful.⁶¹ The Office declines to adopt such a rule. It is for a court to determine willfulness in an infringement action based on all of the particular facts at issue in a given case.

Concerning the Office's reliance on remitter-provided material, the Office did not receive any comments critical of the proposed rule. Consequently, that portion of the provision is being retained. The interim rule makes slight changes to the proposed version of the provision to clarify that the Office will not only rely on remitter-provided indexing information, but also on the certifications that accompany a document or notice and any other remitter-provided information. The interim rule also makes plain that what the Office means by reliance is that it may not necessarily confirm the accuracy of any such certifications or information against the actual document itself.

E. Recordation Certificate and Returning of Document

As before, once recorded, the document or notice of termination will be returned to the remitter with a certificate of recordation. Currently, all recorded documents and notices are digitally imaged and electronically stamped with an official recordation number and page numbers. This stamped copy is then printed and sent to the remitter with a paper recordation certificate. Where an original document is submitted, it is also returned. The Office plans to continue under this paper-based process while the new electronic recordation system is being developed.

F. Scope of Office's Examination and Effect of Recordation

One commenter inquired into the level of review the Office performs in examining recordation submissions, noting that it interpreted the NPRM's proposed

⁶¹ MRI Comments at 4–5.

language about parties bearing the consequences of their inaccuracies to indicate that the Office will not review submitted materials for accuracy or completeness.⁶² The commenter recommended that if that is not the Office’s intent, that the Office follow the recommendation from the Brauneis Report,⁶³ which suggested that the Office cease screening each individual remitted document for compliance with the various recordation requirements.⁶⁴ The report recommended that remitters instead should certify that a document satisfies all of the requirements for recordation, and that the Office only “spot-screen” a sample of submissions to identify systematic problems, with the goal of trying to reduce them through corrective measures like better education.⁶⁵ The report did note, however, that some particular types of submissions, such as notices of termination, might still warrant document-by-document examination.⁶⁶

While the Office declines to adopt this exact approach at this time, the Office has decided to implement something similar. The Office agrees that it need not exhaustively review every recordation submission for compliance with all applicable laws, rules, and instructions, but there is a benefit to both remitters and the public at large in the Office at least examining submissions individually for facially obvious deficiencies⁶⁷ so as to ensure that the majority of recorded documents and notices of termination are in

⁶² Kernochan Comments at 2.

⁶³ *Id.*

⁶⁴ *Brauneis Report* at 58, 84.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ To be clear, the Office means only those deficiencies pertaining to the requirements for recordation; not other types of deficiencies that could affect the underlying validity or legal effectiveness of the document or notice. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, sec. 2305 (3d ed. 2017) (“Members of the general public who submit documents for recordation cannot expect the Office to screen a document for even obvious errors or discrepancies. Therefore, parties are strongly advised to review and scrutinize any document to ensure that the document is legally sufficient to accomplish the purpose for which it is intended before it is submitted for recordation.”).

compliance with the legal and formal requirements for recordation.⁶⁸ As discussed above, and in line with the Brauneis Report’s recommendation, the Office is requiring various certifications and certain indexing information to be provided to the Office that, as the interim rule makes clear, the Office will not necessarily check against the remitted document or notice itself. While the Office intends to only examine submissions for facially obvious deficiencies, it may continue to perform a more comprehensive review, such as for notices of termination, at its discretion. Likewise, the Office also reserves the right to engage in a less comprehensive review, closer to what the Brauneis Report recommended, as a matter of administrative convenience.

Even with a more comprehensive level of review there is always the potential that some documents and notices that fail to comply with the requirements for recordation might still get recorded by the Office because the deficiency is simply not caught during the examination process. Consequently, for clarity and avoidance of doubt, the interim rule makes some adjustments to the existing notice of termination provision concerning the legal effect of recordation and adds a similar provision for section 205 documents.⁶⁹

⁶⁸ This is in contrast to, for example, examining applications for copyright registration. Registering a work involves a substantive determination by the Office as to a work’s copyrightability and can constitute prima facie evidence of a valid copyright. *See* 17 U.S.C. 410(a)–(c). Recordation is a more ministerial act, akin to the Office’s acceptance of other types of filings for inclusion in the public record. For example, the Office accepts statements of account under the section 111 cable license after a review for “obvious errors or omissions appearing on the face of the documents” (see 37 CFR 201.17(c)(2)), notices of intention under the section 115 compulsory license without review for “legal sufficiency,” “errors or discrepancies” (see 37 CFR 201.18(g)), and agent designations made pursuant to section 512(c)(2) without any examination.

⁶⁹ While the provision for section 205 documents is technically new, the Office currently already provides similar guidance. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, sec. 2305 (3d ed. 2017) (“Although the Office will record a document after it has been executed, it does not issue or enforce notices of termination, transfers of ownership, or other documents pertaining to copyright. The Office only serves as an office of public record for such documents. . . . The fact that a document has been recorded is not a determination by the U.S. Copyright Office concerning the validity or the effect of that document. That determination can only be made by a court of law. . . . [T]he Office only examines documents to determine if they comply with the requirements of the Copyright Act and the Office’s regulations. The Office will not attempt to interpret the substantive content of any document that has been

The interim rule makes even clearer that the act of recordation should in no way be construed as a determination by the Office that a document or notice is valid or legally effective. The interim rule also makes plain that recordation is without prejudice to any party claiming, including in court, that the requirements for recordation or effectuating termination have not been met.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Interim Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Revise § 201.4 to read as follows:

§ 201.4 Recordation of transfers and other documents pertaining to copyright.

(a) *General.* This section prescribes conditions for the recordation of transfers of copyright ownership and other documents pertaining to a copyright under 17 U.S.C. 205.

A document is eligible for recordation under this section if it meets the requirements of paragraph (d) of this section, if it is submitted in accordance with the submission procedure described in paragraph (e) of this section, and if it is accompanied by the fee specified in § 201.3(c). The date of recordation is the date when all of the elements required for recordation, including a proper document, fee, and any additional required

submitted for recordation. Likewise, the Office will not attempt to determine whether a document satisfies the legal requirements that may be necessary for it to be effective or enforced.”).

information, are received in the Copyright Office. After recordation the document is returned to the sender with a certificate of recordation. The Office may reject any document submitted for recordation that fails to comply with 17 U.S.C. 205, the requirements of this section, or any relevant instructions or guidance provided by the Office.

(b) *Documents not recordable under this section.* This section does not govern the filing or recordation of the following documents:

- (1) Certain contracts entered into by cable systems located outside of the 48 contiguous States (17 U.S.C. 111(e); see § 201.12);
- (2) Notices of identity and signal carriage complement, and statements of account of cable systems and satellite carriers and for digital audio recording devices and media (17 U.S.C. 111(d), 119(b), and 1003(c); see §§ 201.11, 201.17, 201.28);
- (3) Notices of intention to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works (17 U.S.C. 115(b); see § 201.18);
- (4) Notices of termination (17 U.S.C. 203, 304(c) and (d); see § 201.10);
- (5) Statements regarding the identity of authors of anonymous and pseudonymous works, and statements relating to the death of authors (17 U.S.C. 302);
- (6) Documents pertaining to computer shareware and donation of public domain software (Pub. L. 101-650, sec. 805; see § 201.26);
- (7) Notifications from the clerks of the courts of the United States concerning actions brought under title 17, United States Code (17 U.S.C. 508);
- (8) Notices to libraries and archives of normal commercial exploitation or availability at reasonable prices (17 U.S.C. 108(h)(2)(C); see § 201.39);

- (9) Submission of Visual Arts Registry Statements (17 U.S.C. 113; see § 201.25);
- (10) Notices and correction notices of intent to enforce restored copyrights (17 U.S.C. 104A(e); see §§ 201.33, 201.34); and
- (11) Designations of agents to receive notifications of claimed infringement (17 U.S.C. 512(c)(2); see § 201.38).

(c) *Definitions.* For purposes of this section:

- (1) A *transfer of copyright ownership* has the meaning set forth in 17 U.S.C. 101.
- (2) A *document pertaining to a copyright* is any document that has a direct or indirect relationship to the existence, scope, duration, or identification of a copyright, or to the ownership, division, allocation, licensing, or exercise of rights under a copyright. That relationship may be past, present, future, or potential.
- (3) An *actual signature* is any legally binding signature, including an electronic signature as defined in 15 U.S.C. 7006.
- (4) A *sworn certification* is a statement made in accordance with 28 U.S.C. 1746 that the copy of the document submitted for recordation is, to the best of the certifier's knowledge, a true copy of the original, signed document. A sworn certification must be signed by one of the parties to the signed document, a successor-in-interest to one of the parties to the signed document, or the authorized representative of such a party or successor. Authorized representatives must state who they represent and successors-in-interest must describe their relationship to the document or the original parties to the document. An authorized representative of a successor-in-interest must describe the successor's relationship to the document or the original parties to the document. A sworn certification may be signed electronically.

(5) An *official certification* is a certification, by the appropriate governmental official, that the original of the document is on file in a public office and that the copy of the document submitted for recordation is a true copy of the original. An official certification may be signed electronically.

(d) *Document requirements--(1) Original or certified copy.* The remitter must submit either the original document that bears the actual signature(s) of the person(s) who executed it, or a copy of the original, signed document accompanied by a sworn certification or an official certification. Each document submitted for recordation must be certified to either have the actual signature(s) (if it is an original document) or reproduce the actual signature(s) (in the case of a copy of the original document). All documents lacking a handwritten, wet signature (including all documents bearing an electronic signature) are considered to be copies of the original, signed document, and must be accompanied by a sworn certification or an official certification. Where an actual signature on the relevant document is not a handwritten or typewritten name, such as when an individual clicks a button on a website or application to indicate agreement to contractual terms, the remitter must submit a description of the nature of the signature and documentation evidencing the existence of the signature (*e.g.*, a database entry or confirmation email showing that a particular user agreed to the terms by clicking “yes” on a particular date). Where such description and evidence are provided, the Office will make them available for public inspection and may presume that the signature requirement for recordation has been satisfied, without prejudice to any party claiming otherwise, including before a court of competent jurisdiction.

(2) *Completeness.* Each document submitted for recordation must be, and be certified to be, complete by its terms, but need only include referenced schedules, appendices, exhibits, addenda, or other material essential to understanding the copyright-related aspects of the document.

(3) *Legibility.* Each document submitted for recordation must be, and be certified to be, legible.

(4) *Redactions.* The Office will accept and make available for public inspection redacted documents certified to be redacted in accordance with this paragraph (d)(4), provided that all of the following conditions are satisfied:

(i) The redactions must be limited to financial terms, trade secret information, social security or taxpayer-identification numbers, and financial account numbers. Additional types of information may be redacted on a case-by-case basis if the need for any such redactions is justified to the Office in writing and approved by the Office; such written requests should be included in the remitter's recordation submission to the Office.

(ii) The blank or blocked-out portions of the document must be labeled "redacted" or the equivalent.

(iii) Each portion of the document required by paragraph (d)(2) of this section must be included.

(5) *English language requirement.* The Office will accept and record non-English language documents and indexing information only if accompanied by an English translation that is either signed by the individual making the translation or, if a publicly available commercial or consumer translation software product or automated service is used, by the individual using such product or service and accompanied by the name of the

product or service. All translations will be made available for public inspection and may be redacted in accordance with paragraph (d)(4) of this section.

(e) *Paper submission procedure--(1) Process.* A document may be submitted for recordation by sending it to the appropriate address in § 201.1(b) or to such other address as the Office may specify, accompanied by a cover sheet, the proper fee, and, if applicable, any electronic title list. Absent special arrangement with the Office, the Office reserves the right to not process the submission unless all of the items necessary for processing are received together.

(2) *Cover sheet required.* Submission of a document must include a completed Recordation Document Cover Sheet (Form DCS), available on the Copyright Office website. Remitters must follow all instructions provided by the Office in completing Form DCS, including by providing all requested indexing information. Form DCS may be used to provide a sworn certification, if appropriate, and to make any of the other certifications required by this section. Form DCS will not be considered part of the recorded document, but will be used by the Office for examination, indexing, and other administrative purposes. The Office may reject any document submitted for recordation that includes an improperly prepared cover sheet.

(3) *Electronic title list.* (i) In addition to identifying the works to which a document pertains in the paper submission, the remitter may also submit an electronic list setting forth each such work. The electronic list will not be considered part of the recorded document, but will be used by the Office for indexing purposes. Absent special arrangement with the Office, the electronic list must be included in the same package as the paper document to be recorded. The electronic list must be prepared and submitted to

the Office in the manner specified by the Copyright Office in instructions made available on its website. The Office may reject any document submitted for recordation that includes an improperly prepared electronic title list.

(ii) If a remitter of a recorded document finds that an error or omission in an electronic title list has led to the inaccurate indexing of the document in the public catalog, the remitter may request that the record be corrected by following the instructions provided by the Office on its website. Upon receipt of a properly prepared corrective filing and the appropriate fee, the Office will proceed to correct the information in the public catalog, and will make a note in the record indicating that the corrections were made and the date they were made.

(4) *Return receipt.* If a remitter includes two copies of a properly completed Form DCS indicating that a return receipt is requested, as well as a self-addressed, postage-paid envelope, the remitter will receive a date-stamped return receipt attached to the extra copy acknowledging the Copyright Office's receipt of the enclosed submission. The completed copies of Form DCS and the self-addressed, postage-paid envelope must be included in the same package as the submitted document. A return receipt confirms the Office's receipt of the submission as of the date indicated, but does not establish eligibility for, or the date of, recordation.

(5) *Remitter certification.* The remitter must certify that he or she has appropriate authority to submit the document for recordation and that all information submitted to the Office by the remitter is true, accurate, and complete to the best of the remitter's knowledge.

(f) *Reliance on remitter-provided information.* The Copyright Office will rely on the certifications submitted with a document and the information provided by the remitter on Form DCS and, if provided, in an accompanying electronic title list. The Office will not necessarily confirm the accuracy of such certifications or information against the submitted document.

(g) *Effect of recordation.* The fact that the Office has recorded a document is not a determination by the Office of the document's validity or legal effect. Recordation of a document by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for recordation have not been met, including before a court of competent jurisdiction.

3. Revise § 201.10(f) to read as follows:

§ 201.10 Notices of termination of transfers and licenses.

* * * * *

(f) *Recordation.* A copy of a notice of termination shall be recorded in the Copyright Office as required by 17 U.S.C. 203(a)(4)(A), 17 U.S.C. 304(c)(4)(A), or 17 U.S.C. 304(d)(1) if it meets the requirements of paragraph (f)(1) of this section, is submitted in compliance with paragraph (f)(2) of this section, and is accompanied by the fee specified in § 201.3(c). The Office may reject any notice submitted for recordation that fails to comply with 17 U.S.C. 203(a), 17 U.S.C. 304(c), 17 U.S.C. 304(d), the requirements of this section, or any relevant instructions or guidance provided by the Office.

(1) *Requirements.* The following requirements must be met before a copy of a notice of termination may be recorded in the Copyright Office.

(i) *What must be submitted--(A) Copy of notice of termination.* A copy of a notice of termination submitted for recordation must be, and be certified to be, a true, correct, complete, and legible copy of the signed notice of termination as served. Where separate copies of the same notice were served on more than one grantee or successor-in-title, only one copy need be submitted for recordation.

(B) *Statement of service.* The copy submitted for recordation must be accompanied by a statement setting forth the date on which the notice was served and the manner of service, unless such information is contained in the notice. In instances where service is made by first class mail, the date of service shall be the day the notice of termination was deposited with the United States Postal Service.

(ii) *Timeliness.* (A) The Copyright Office will refuse recordation of a notice of termination as such if, in the judgment of the Copyright Office, such notice of termination is untimely. Conditions under which a notice of termination will be considered untimely include: the effective date of termination does not fall within the five-year period described in section 203(a)(3) or section 304(c)(3), as applicable, of title 17, United States Code; the documents submitted indicate that the notice of termination was served less than two or more than ten years before the effective date of termination; or the date of recordation is after the effective date of termination.

(B) If a notice of termination is untimely, the Office will offer to record the document as a “document pertaining to a copyright” pursuant to § 201.4, but the Office will not index the document as a notice of termination.

(C) In any case where an author agreed, prior to January 1, 1978, to a grant of a transfer or license of rights in a work that was not created until on or after January 1, 1978, a

notice of termination of a grant under section 203 of title 17 may be recorded if it recites, as the date of execution, the date on which the work was created.

(2) *Paper submission procedure*--(i) *Process*. A copy of a notice of termination may be submitted for recordation by sending it to the appropriate address in § 201.1(c) or to such other address as the Office may specify, accompanied by a cover sheet, the statement of service, and the proper fee.

(ii) *Cover sheet required*. Submission of a copy of a notice of termination must be accompanied by a completed Recordation Notice of Termination Cover Sheet (Form TCS), available on the Copyright Office website. Remitters must follow all instructions provided by the Office in completing Form TCS, including by providing all requested indexing information. Form TCS may be used to provide the statement of service and to make any of the certifications required by this paragraph (f). Form TCS will not be considered part of the recorded notice, but will be used by the Office for examination, indexing, and other administrative purposes. The Office may reject any notice submitted for recordation that includes an improperly prepared cover sheet.

(iii) *Return receipt*. If a remitter includes two copies of a properly completed Form TCS indicating that a return receipt is requested, as well as a self-addressed, postage-paid envelope, the remitter will receive a date-stamped return receipt attached to the extra copy acknowledging the Copyright Office's receipt of the enclosed submission. The completed copies of Form TCS and the self-addressed, postage-paid envelope must be included in the same package as the submitted notice. A return receipt confirms the Office's receipt of the submission as of the date indicated, but does not establish eligibility for, or the date of, recordation.

(iv) *Remitter certification.* The remitter must certify that he or she has appropriate authority to submit the notice for recordation and that all information submitted to the Office by the remitter is true, accurate, and complete to the best of the remitter's knowledge.

(3) *Date of recordation.* The date of recordation is the date when all of the elements required for recordation, including the prescribed fee and, if required, the statement of service, have been received in the Copyright Office. After recordation, the notice, including any accompanying statement, is returned to the sender with a certificate of recordation.

(4) *Effect of recordation.* The fact that the Office has recorded a notice is not a determination by the Office of the notice's validity or legal effect. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for effectuating termination (including the requirements pertaining to service and recordation of the notice of termination) have not been met, including before a court of competent jurisdiction.

(5) *Reliance on remitter-provided information.* The Copyright Office will rely on the certifications submitted with a notice and the information provided by the remitter on Form TCS and, if provided, in an accompanying statement of service. The Office will not necessarily confirm the accuracy of such certifications or information against the submitted notice.

* * * * *

Dated: October 25, 2017.

Karyn Temple Claggett,
Acting Register of Copyrights and
Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-30-P]

[FR Doc. 2017-24527 Filed: 11/9/2017 8:45 am; Publication Date: 11/13/2017]