



U.S. Copyright Office

37 CFR Part 201

[Docket No. 2020-10]

Modernizing Recordation of Notices of Termination

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

ACTION: Final rule; Statement of policy.

SUMMARY: The Copyright Office is amending certain regulations governing the recordation of notices of termination to improve efficiency in processing. This final rule adopts regulatory language set forth in the Office's June 2020 notice of proposed rulemaking and notification of inquiry with some modifications in response to public comments. The Office also addresses public comments submitted in response to the subjects of inquiry published in the notification of inquiry.

DATES: Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel, by email at regans@copyright.gov, Kevin R. Amer, Deputy General Counsel, by email at kamer@copyright.gov, or Nicholas R. Bartelt, Attorney-Advisor, by email at niba@copyright.gov. Each can be contacted by telephone at (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Office is in the midst of a multi-year modernization of its services and systems. One component of this comprehensive modernization initiative is the development of an online electronic system to process documents submitted for recordation, including notices of termination. In April 2020, the Office launched a limited

pilot of this new system to allow pilot participants to submit certain transfers of ownership and other documents pertaining to copyright for recordation. Since then, the Office has recorded over 900 documents through the system while expanding functionality for the growing number of pilot users. Before implementing features to permit electronic recordation of notices of termination, the Office issued a notice of proposed rulemaking on June 3, 2020 (the “NPRM”) to update its regulations governing recordation of notices of termination, clarify examination practices concerning terminations relating to multiple grants, and to solicit public comment on two related subjects of inquiry.¹

A. Current Rules and Practices for Recording Notices of Termination

In enacting the Copyright Act of 1976, Congress created a process for authors to reclaim previously-granted rights in their works by terminating grants after a period of years has elapsed. As explained in the NPRM, authors may accomplish this by selecting an effective date of termination within a five-year window that is set by statute, preparing a notice of termination containing this date and other information necessary to identify which grant(s) of rights in which work(s) are being terminated, serving the notice on the grantee(s) or successor(s) in title, and recording a copy of the notice with the Copyright Office.² Recordation of the notice with the Office “before the effective date of termination” is “a condition to its taking effect,” and such “notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.”³ More broadly, section 702 of the Act authorizes the Register to “establish regulations . . . for the administration of the functions and duties made the

¹ Modernizing Recordation of Notices of Termination, 85 FR 34150 (June 3, 2020) (notice of proposed rulemaking; notification of inquiry).

² 85 FR 34150–51 (citing 17 U.S.C. 203, 304(c)).

³ 17 U.S.C. 203(a)(4), 304(c)(4). These provisions also apply to section 304(d)(1), another termination provision, which incorporates section 304(c)(4) by reference. *Id.* at 304(d)(1).

responsibility of the Register under [title 17],” and section 705(a) requires the Register to “ensure that records of . . . recordations . . . are maintained, and that indexes of such records are prepared.”⁴

In establishing regulations under this authority, the Office has long held the view that the “required contents of the notice must not become unduly burdensome to grantors, authors, and their successors,” who may lack knowledge of certain information, such as the applicable dates.⁵ Therefore, to the extent permitted by the statute, the Office generally seeks to avoid outright rejection of termination notices submitted for recordation on grounds of technical noncompliance with Office regulations. Instead, the Office will often correspond with remitters to assist them in bringing deficient submissions into compliance with the relevant regulations⁶—for example, by supplying required information omitted from the original submission. This general policy in favor of recordation is particularly appropriate in light of the asymmetrical consequences associated with the determination of whether or not to record a notice.⁷ As the Office’s

⁴ *Id.* at 702, 705(a).

⁵ Termination of Transfers and Licenses Covering Extended Renewal Term, 42 FR 45916, 45918 (Sept. 13, 1977) (“[W]e remain convinced that the required contents of the notice must not become unduly burdensome to grantors, authors, or their successors, and must recognize that entirely legitimate reasons may exist for gaps in their knowledge or certainty.”); *id.* at 45917 (“The preparation of notice[s] of termination will be occurring at a time far removed from the original creation and publication of a work and, in many cases, will involve successors of original authors having little, if any, knowledge of the details of original creation or publication.”); *id.* at 45918 (recognizing that “it will commonly be the case that the terminating author, or the terminating renewal claimant . . . will not have a copy of the grant or ready access to a copy”).

⁶ *See, e.g.*, Modernizing Copyright Recordation, 82 FR 22771, 22771 (May 18, 2017) (notice of proposed rulemaking) (summarizing the Office’s document recordation process, which “can . . . involve considerable correspondence with remitters to remedy deficient submissions before they can be recorded”); U.S. Copyright Office, *Compendium of Copyright Office Practices* sec. 2310.7 (3d ed. 2021) (“Compendium (Third)”) (Where a notice does not comply with recordation requirements, a “recordation specialist may communicate with the remitter, may refuse to record the notice, or may refuse to index the notice as a notice of termination.”).

⁷ The Office previously observed that adopting a permissive recordation policy is consistent with the statutory purpose of allowing authors to exercise their termination rights. *See* U.S. Copyright Office, *Analysis of Gap Grants under the Termination Provisions of Title 17* 3 (2010) (“Gap Grant Analysis”) (citing H.R. Rep. No. 94–1476, at 124 (1976); S. Rep. No. 94–473, at 108 (1975)).

regulations state, recordation is “not a determination by the Office of the notice’s validity or legal effect” and “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.”⁸ By contrast, a refusal to record can “permanently invalidate a notice of termination that is otherwise legally sound,” and thereby deprive the copyright owner of the ability to reclaim rights in her work.⁹

II. The Final Rule

With this background and these policies in mind, the Office proposed several amendments to its regulations governing notices of termination to facilitate recordation and compliance with regulatory requirements. The Office received ten comments in response.¹⁰ Commenters generally supported the broad goal of modernizing recordation of notices by improving efficiency and clarifying the Office’s processes.¹¹ At the same time, comments also emphasized the importance of recordation to grantees, consistent and reliable examination practices, and encouraging preparation of notices that clearly communicate accurate information about the grants and works they identify.¹² Having considered these comments, the Office issues this final rule with modifications.

⁸ 37 CFR 201.10(f)(4); *see Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1117–18 (9th Cir. 2015) (noting that validity and effect of notices can only be determined by a court of law, not the Copyright Office).

⁹ Gap Grant Analysis at ii n.3.

¹⁰ *See* Authors Alliance Comments; Joint Comments of The Authors Guild, American Photographic Artists, Songwriters Guild of America, Inc., Society of Composers & Lyricists, National Press Photographers Association, Professional Photographers of America, American Society of Media Photographers, Inc., The American Society for Collective Rights Licensing, The North American Nature Photography Association, and Graphic Artists Guild, Inc. (“Authors Guild et al.”); Linda Edell Howard Comments; Motion Picture Association (“MPA”) Comments; Music Artists Coalition (“MAC”) Comments; Nashville Songwriters Association International (“NSAI”) Comments; National Music Publishers Association (“NMPA”) Comments; Recording Academy Comments; Recording Industry Association of America (“RIAA”) Comments.

¹¹ *See* Authors Alliance Comments at 1; Joint Comments of Authors Guild et al. at 1–2; Edell Howard Comments at 1; MAC Comments at 1; NSAI Comments at 2; Recording Academy Comments at 2.

¹² *See, e.g.*, RIAA Comments at 2–3.

A. *Timeliness*

The Office proposed two updates to the rule governing timeliness. First, the Office proposed to relax the existing provision stating that the Office “will refuse” to record a notice that appears to be untimely, substituting the phrase “may refuse.”¹³ Until recently, the provision said that the Office “reserves the right to refuse recordation of a notice of termination.”¹⁴ The 2017 notice announcing the amendment of the provision to “will refuse” did not discuss the basis for that change.¹⁵ As explained in the NPRM, the proposed rule would afford the Office additional discretion to record a notice in unusual cases—for example, where there is uncertainty about the date of a work’s creation that could be relevant to the calculation of the termination window.¹⁶ Most commenters supported giving the Office the ability to exercise this discretion, at least where there is some uncertainty whether a notice is in fact untimely.¹⁷ Some commenters, however, expressed concerns about the Office recording notices that are clearly untimely, arguing that doing so would disserve both grantors, who may be able to correct and re-file such notices, and grantees, who desire confidence that the Office will not record notices that definitively fail to comply with statutory timing provisions.¹⁸

¹³ 85 FR 34155.

¹⁴ *See* Recordation of Notices of Termination of Transfers and Licenses; Clarifications, 74 FR 12554, 12556 (Mar. 25, 2009).

¹⁵ *See* 85 FR 34151.

¹⁶ *Id.*

¹⁷ Joint Comments of Authors Guild et al. at 3–4; Edell Howard Comments at 3; NSAI Comments at 2; Recording Academy Comments at 2; MPA Comments at 5–6 (suggesting that if the proposed rule is adopted, “the ‘may’ in the regulation should operate only as a safety valve to address particular unusual situations where an *apparently* untimely notice may not *actually* be untimely”); RIAA Comments at 3–4.

¹⁸ Copyright Alliance Comments at 2 (taking no position on recordation of notices filed late, but commenting that notices that are facially premature should be refused to help grantors by making them aware the notices are defective and to spare grantees the burden of challenging validity in court); MPA at 6 (“[A]bsent unusual circumstances, the Office should maintain its practice of refusing to record notices that appear on their face to be untimely.”); NMPA Comments at 1–3 (commenting that the Office does not have discretion to record a notice it “*knows* to be untimely”); RIAA Comments at 3–4.

Although the Office is proceeding with this clarifying proposed amendment, to address concerns raised by commenters, it takes this opportunity to explain that the amendment is not intended to be substantive and is being adopted to harmonize the provision with regulatory language governing the rejection of documents submitted for recordation under section 205 of the Copyright Act.¹⁹ Moreover, the amendment is not intended to alter the Office’s examination practices for notices of termination. Rather, the Office will continue to examine notices for compliance with statutory timing provisions. On this topic, the Office recently stated that while it views recordation generally as a “ministerial act,” it has continued its “more comprehensive review” of notices of termination submitted for recordation.²⁰ Under current examination practices, if a notice appears to be untimely, the recordation specialist will correspond with the remitter to afford them the opportunity to amend, re-serve, and re-file notices where possible. If, in the judgment of the Office, a notice is definitely untimely and cannot be amended, the specialist will offer the remitter the option to record it as a document pertaining to copyright under section 205 of the Copyright Act.²¹ Should the remitter refuse this option, the Office may then exercise its discretion to reject the notice.²² Thus, while the Office typically still will decline to record a notice that it determines to be untimely and this adjustment signals no change in practice in that respect, the additional discretion

¹⁹ See 37 CFR 201.4(a) (“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.”); *id.* § 201.4(e)(1), (e)(3)(i).

²⁰ See Modernizing Copyright Recordation, 82 FR 52213, 52218 & n.68 (Nov. 13, 2017) (interim rule).

²¹ 37 CFR 201.10(f)(1)(ii)(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.”).

²² In a scenario where a notice is timely as to some—but not all—works identified, the recordation specialist will typically first correspond to provide the remitter an opportunity to amend, re-serve, and re-file where possible. Where it is too late to amend and re-serve the notice (*i.e.*, the termination window has closed or will close in less than two years) or the remitter otherwise declines to withdraw the submission, the specialist may record the document as a notice of termination, but only index the works for which the notice is timely.

provided by this change helps to advance the broader policy favoring recordation where legally permitted.²³

Second, the proposed rule clarified the circumstances under which recordation of an untimely notice is barred by statute. In a 2017 interim rule, the Office amended the regulations to provide examples of situations in which a notice will be considered untimely.²⁴ One such example refers to cases where “the date of recordation is *after* the effective date of termination.”²⁵ Because the relevant statutory provisions provide that “[a] copy of the notice shall be recorded in the Copyright Office *before* the effective date of termination, as a condition to its taking effect,”²⁶ the NPRM proposed to amend this example to clarify that a date of recordation “on or” after the effective date of termination will be considered untimely.²⁷ RIAA agreed with proposed rule.²⁸ Linda Edell Howard and NSAI each opposed this change, asserting that a notice may be recorded if it is submitted to the Office on the effective date of recordation.²⁹ Because that interpretation is contrary to the statutory text, however, the final rule adopts the proposed amendment.

B. Harmless errors

The NPRM proposed broadening the harmless errors exception, which currently applies only to “errors in a notice,” to apply equally to immaterial errors in complying with other regulatory provisions established by the Office. Under the proposed rule, any error in “preparing, serving, or seeking to record a notice” would be considered harmless, provided that the error does not materially affect the adequacy of the information

²³ See 37 CFR 201.10(f)(4) (“Recordation of a notice . . . 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.”).

²⁴ 82 FR 52220.

²⁵ 37 CFR 201.10(f)(1)(ii)(A) (emphasis added).

²⁶ 17 U.S.C. 203(a)(4)(A), 304(c)(4)(A) (emphasis added).

²⁷ 85 FR at 34152.

²⁸ RIAA Comments at 5.

²⁹ Edell Howard Comments at 4; NSAI Comments at 3.

required to serve the purposes of the termination statutes or “materially affect . . . the Office’s ability to record the notice.”³⁰

Comments on this proposed change were mixed. Three commenters fully supported the rule as proposed.³¹ Another commenter, MPA, “agree[d] with certain principles” in the Office’s proposal, but viewed the proposed language as “overbroad and potentially ambiguous.”³² MPA further argued that errors in the manner of service itself should not be treated as harmless because as “a technical procedure . . . strict compliance is typically required in the analogous litigation context,” and proposed more narrowly tailored language.³³ Raising similar concerns, NMPA and RIAA opposed expanding the scope of the rule, contending that (1) errors in serving a notice are not and should not be considered harmless; and (2) the wording of the proposed rule suggests that an error that does not affect the Office’s ability to record the notice may be considered harmless even if the error materially affects the ability of the notice to serve the purposes of the statute.³⁴

While the Office will proceed with expanding the scope of the current harmless errors rule, it agrees that the language could more precisely describe its intended application. Therefore, the Office modifies the final rule as follows.

First, although an error in “serving” the notice would likely not be considered harmless because it would materially affect the notice’s ability to serve the purposes of the statute, the Office has revised the provision to clarify that harmless errors in a *statement of service* shall not render a notice invalid.³⁵ The final rule also specifies that

³⁰ 85 FR 34155.

³¹ Edell Howard Comments at 5; NSAI Comments at 3; Recording Academy Comments at 2.

³² MPA Comments at 6.

³³ *Id.* at 6–7.

³⁴ NMPA Comments at 4–5; RIAA Comments at 5.

³⁵ *See* MPA Comments at 6 (proposing language similar to that adopted by the final rule).

errors in “indexing information,” whether provided electronically or using a cover sheet such as the current Form TCS, may be harmless. In other words, if the cover sheet or electronic indexing information deviates in immaterial ways from the information provided on the notice itself, such errors may be harmless provided that the information in the notice itself adequately serves the purposes of the statute. Thus, the revised language clarifies that the harmless error provision extends only to immaterial errors in the notice, statement of service, or indexing information provided to the Office.

Second, because the final rule now expressly includes the statement of service and indexing information in this harmless error provision, it strikes the proposed language that certain errors may be harmless so long as they “do not materially affect, in the Office’s discretion, the Office’s ability to record the notice.” This language was intended to account for a situation where an error in a submission would not materially affect the adequacy of the information required to serve the purposes of the statute, but would affect the Office’s ability to record the notice. For example, if a notice that complied with the statutory and regulatory requirements was timely served on the grantee, but the remitter subsequently failed to include the date of service in the statement of service submitted to the Office, the purposes of the statute would be served because the grantee would have adequate notice, yet the omission of the date of service would hamper the Office’s ability to examine the notice for timeliness. Two commenters, NMPA and RIAA, contended that the proposed language could be read to suggest that an error could be considered “harmless” so long as it does not affect the Office’s ability to record the notice even if the error *does* materially affect the information required to serve the statutory purpose.³⁶ The Office did not intend this interpretation of the proposed provision, and agrees that it is unnecessary to reference the statutory purpose in this

³⁶ See NMPA Comments at 4–5; RIAA Comments at 6.

provision in light of the newly added language specifying where a harmless error may occur—*i.e.*, “in a notice, statement of service, or indexing information.” Instead, reference to the statutory purpose remains part of the broader definition of what makes an error “harmless.” The final rule accordingly provides that “an error is ‘harmless’ if it does not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 203, 304(c), or 304(d), whichever applies.”³⁷

C. Manner of service

To modernize how service of notices may be effected, the Office proposed two additional permissible manners of service: (1) by reputable courier (*e.g.*, FedEx, UPS, DHL); and (2) by email where the grantee expressly consents.³⁸ With respect to the first change, commenters unanimously supported allowing notices to be delivered to grantees by reputable couriers.³⁹ The final rule accordingly adopts this proposal.⁴⁰

³⁷ To reiterate, although the regulations provide that harmless errors shall not render a notice invalid, the Office’s decision to record a notice is not a determination that any errors that the submission may contain are, in fact, harmless or that the notice itself is valid. *See* 37 CFR 201.10(e)(1), (f)(4).

³⁸ 85 FR 34155.

³⁹ *See* Joint Comments of Authors Guild et al. at 6; Copyright Alliance Comments at 2–3; MPA at 7–9; Edell Howard at 5; NMPA at 6; Recording Academy at 2; RIAA at 6–7. While supporting expanded physical delivery options, the Copyright Alliance observed that delivery services that require a signature may not be appropriate because of the risk that a delivery may not be accepted. Copyright Alliance Comments at 2–3. Although this is a valid concern, the Office retains the language that a notice be delivered by courier service because the grantor is in the best position to rectify any delivery issue.

⁴⁰ Some commenters proposed that the Office eliminate first class mail as an acceptable manner of service and instead allow only trackable mailing options such as priority or certified mail. *See* Copyright Alliance Comments at 2–3; MPA Comments at 8; NMPA Comments at 6; RIAA Comments at 6–7. While the Office acknowledges the benefits of using trackable services, it will retain first class mail as an acceptable manner of service because it remains an affordable, widely accessible option. Moreover, the Office is disinclined to eliminate first class mail as an option while it remains an acceptable method in federal courts to notify a defendant that an action has been commenced and request the defendant waive service of the summons. *See* Fed. R. Civ. P. 4(d)(1). The Office, however, encourages terminating parties to serve notices using trackable delivery options where feasible, agreeing with RIAA’s observation that using these options “would help avoid unnecessary disputes as to whether a grantee has received a termination notice and/or where the notice was sent.” RIAA Comments at 7; *see also* MPA Comments at 7 n.11 (“[T]he benefits of having a clear record of service including, for example, the avoidance of litigation over whether service was properly effected are enormous, potentially representing many thousands of dollars in legal fees.”).

With respect to email service, the proposed rule stated that service by email would be considered acceptable where the grantee or successor-in-title being served “expressly consents to accept service in this manner.”⁴¹ Most commenters supported permitting email service, at least in principle, while raising concerns about how this option might function in practice and offering alternative proposals.⁴² A number of commenters questioned what “express consent” would entail and how it might be sought from and given by grantees. Three commenters considered obtaining express consent to be too burdensome for the terminating party,⁴³ and Authors Guild et al. recommended that the remitter instead be allowed to “self-certify” that the notice was sent to an email address, such as “an alias dedicated to receiving legal notices,” found after a “reasonable investigation.”⁴⁴ Several commenters—both in support of and opposed to email service— noted that any consent must be provided from a person with authority to do so,⁴⁵ and sufficiently close in time to when a notice is served.⁴⁶ Others urged the Office to require safeguards to prevent notices from being sent to outdated emails or filtered out as spam or junk email.⁴⁷ Commenters proposed various requirements to address these concerns,

⁴¹ 85 FR 34155.

⁴² Joint Comments of Authors Guild et al. at 5; Edell Howard Comments at 5; MPA Comments at 8; NMPA Comments at 6–7; NSAI Comments at 4; Recording Academy Comments at 2.

⁴³ Joint Comments of Authors Guild et al. at 5; Edell Howard Comments at 5 (commenting that “requiring express consent for service by email is burdensome and onerous”); NSAI Comments at 4 (“[R]equiring express consent by the grantee to accept service in one manner or another inappropriately shifts control to the grantee, who has no legal right to make the author’s termination burdensome.”).

⁴⁴ Joint Comments of Authors Guild et al. at 5.

⁴⁵ See NMPA Comments at 6 (“[T]he Office should consider how grantees should designate the person(s) authorized to consent to and receive email service on behalf of the grantee.”); RIAA Comments at 8 (“Any consent to email service by a company must be clearly and affirmatively given by a duly authorized legal officer.”).

⁴⁶ See MPA Comments at 8 n.12 (noting that “an email address that is valid at the time of the original grant is unlikely to remain valid several decades later, when notice of termination may be served”); RIAA Comments at 7 (proposing “consent be obtained close in time to the date of service (e.g., no more than 30 days prior to service), but in advance of (not simultaneous with) actual service”).

⁴⁷ See Joint Comments of Authors Guild et al. at 5; Copyright Alliance Comments at 3; MPA Comments at 8; NMPA Comments at 6; RIAA Comments at 7.

including that the Copyright Office be copied on notices served by email,⁴⁸ that a terminating party obtain an acknowledgment of receipt from the grantee,⁴⁹ and that a physical courtesy copy be sent to the grantee.⁵⁰

Based on these comments, the Office has revised the proposed rule to further specify conditions by which the terminating party may obtain consent from the grantee, and also to establish two alternate, blanket options by which grantees may signal their acquiescence to email service from any potential terminating parties. With respect to the direct authorization option, the final rule requires the terminating party to (1) obtain express consent in writing from the grantee, successor-in-title, or agent thereof who is duly authorized to accept service on its behalf; (2) within thirty days before service of the notice is made; and (3) send the notice to an email address provided to the terminating party by the grantee or successor-in-title. The first added requirement responds to commenter concerns that consent be given by someone with the appropriate authority. The Office has found a similar approach in a different context to be successful, namely permitting email service of notices of intention and statements of account under section 115 with the consent of the copyright owner or its authorized agent.⁵¹ Since this practice was instituted in 2014, the majority of copyright owners have consented to service by email.⁵² The Office welcomes future feedback on how this provision operates in practice from both terminating parties and grantees.

⁴⁸ Joint Comments of Authors Guild et al. at 5.

⁴⁹ Edell Howard Comments at 5; NMPA Comments at 6–7; RIAA Comments at 7.

⁵⁰ RIAA Comments at 7.

⁵¹ See 37 CFR 201.18(f)(6) (outlining process by which list of works identified in a notice of intention may be submitted by email if the “copyright owner or authorized agent states that such submission will be accepted”); *id.* § 210.6(g)(1)–(2) (permitting electronic service of monthly statements of account “on either the copyright owner or an agent of the copyright owner with authority to receive Statements of Account on behalf of the copyright owner”); *id.* § 210.7(g)(1)–(2) (same process for annual statements of account).

⁵² See Public Notice Regarding Timing Provisions for Persons Affected by COVID-19, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/coronavirus/> (“In practice, the Office understands that a majority of copyright owners have generally elected electronic delivery, but a

In establishing this provision, the Office notes that the requirement that consent be obtained within thirty days before a notice is served ensures that terminating parties obtain consent close in time to serving a notice and affords grantees greater predictability about when they can expect to receive the notice. If for any reason a grantee does not reply to a request for or declines consent, the terminating party continues to bear the burden of serving the notice in acceptable manner, provided there is still time within the statutory framework to do so.⁵³ For this reason, terminating parties seeking consent to serve a notice by email should afford sufficient time to arrange for an alternate method of service. Finally, the third added requirement—that the terminating party serve the notice to an email address provided by the grantee—protects both terminating parties and grantees from the risk that notices could be filtered as spam or sent to inactive or unmonitored email addresses. In this respect, service by email may be more reliable than physical service because mailed notices need only be sent to the last known address for the grantee, which may not be up-to-date.⁵⁴

In addition to providing an avenue for express consent in this manner, the final rule establishes two other ways that grantees may generally opt in to accept email service for notices. First, a grantee or successor-in-title may designate and publicly post on its website an email address either for service of process in general or for service of notices

minority receive NOIs and SOAs by paper, either because they simply have not opted into electronic delivery, or, for a smaller minority, because they have affirmatively expressed a preference for paper.”).

⁵³ The RIAA proposed that “[t]he regulations should state that failure of a grantee to respond to a consent request shall constitute a refusal to consent and that grantors will be held to the statutory timeframes notwithstanding any delay caused by the failure to respond at all or in a prompt manner.” RIAA Comments at 8. Although the Office agrees that grantors bear the risk that a grantee may not respond to a request, it sees no need to further regulate compliance with governing statutory timeframes.

⁵⁴ See RIAA Comments at 2–3, 6–7 (noting that because “a grantee’s last known address is not necessarily the current owner’s up-to-date address . . . the service requirements do not guarantee that the current rights owner will have actual (or timely) knowledge of a purported termination”).

of termination specifically.⁵⁵ Should a grantee no longer wish to accept service of notices by email, it can modify its policy or website accordingly. Because a grantee may update its policies or its website at any time, however, it would be prudent for the terminating party to verify the grantee's current policies and contact information by checking its website immediately prior to serving a notice by email.

Finally, the final rule will enable a grantee to opt in to email service in the event the Copyright Office establishes a public directory for these purposes and the grantee registers an email address in accordance with Office instructions. Two commenters proposed such a registry, akin to the directory the Office established and maintains for designated agents under the Digital Millennium Copyright Act.⁵⁶ Although the Office has no immediate plans for creating this option, it is taking this opportunity to establish the regulatory framework to facilitate such a directory in the future.

D. Identification of a work

Under the current rule, a title is required to identify each work in a notice, and the original registration number is to be provided "if possible and practicable."⁵⁷ The NPRM proposed to amend this provision to allow works to be identified by title, registration number, or both.⁵⁸

⁵⁵ *Cf.* 37 CFR 201.18(a)(6) (providing that "a copyright owner or an agent of a copyright owner with authority to receive Notices of Intention may make public a written policy that it will accept Notices of Intention to make and distribute phonorecords pursuant to 17 U.S.C. 115 . . . delivered by means (including electronic transmission) other than [by mail or reputable courier]").

⁵⁶ *See id.* § 201.38; MPA Comments at 8–9; RIAA Comments at 7. The Office observes that this option is also akin to other filings administered by the Office, such as its list of transmitting entities publicly performing pre-1972 sound recordings requiring direct notice under the Music Modernization Act. *See* 37 CFR 201.36; Directory of Notices of Contact Information for Transmitting Entities Publicly Performing Pre-1972 Sound Recordings, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/notices-contact-information.html>.

⁵⁷ 37 CFR 201.10(b)(1)(iii), (2)(iv).

⁵⁸ 85 FR 34154–55.

Most commenters supported the overall goal of encouraging terminating parties to include registration numbers for works identified in a notice.⁵⁹ Several expressed concern, however, that allowing a work to be identified solely by registration number might lead to material errors and make it more difficult for grantees to identify works.⁶⁰ NMPA noted that “catalogues of many music publishers include the titles of works, but do not always include registration numbers,”⁶¹ while RIAA observed that using a registration number alone may be inadequate to identify a sound recording that was registered as part of an album.⁶² Commenters also questioned why the rule change was needed, as almost all grantors who have the registration number for a work would also have its title, particularly because a certificate of registration includes both.⁶³

In light of the public comments, the Office concludes that the benefit of providing flexibility about how works may be identified in a notice is outweighed by the negative consequences that could flow from permitting a work to be identified by registration number alone. The final rule accordingly removes this proposed change. The Office will continue to require that each work in a notice be identified by title and, where possible and practicable, by the original registration number.⁶⁴

E. Date of recordation

Under the proposed rule, the date of recordation for a notice of termination would be determined by the date when the notice is received by the Office, irrespective of when

⁵⁹ Joint Comments of Authors Guild et al. at 6; Edell Howard Comments at 5–6; MPA Comments at 9; NMPA at 8; Recording Academy Comments at 2.

⁶⁰ Joint Comments of Authors Guild et al. at 6; Copyright Alliance Comments at 3–4; MPA Comments at 9–10; NMPA Comments at 8; RIAA Comments at 8–9.

⁶¹ NMPA Comments at 8.

⁶² RIAA Comments at 8–9.

⁶³ See Copyright Alliance Comments at 3–4; MPA Comments at 10; RIAA Comments at 8.

⁶⁴ Because the Office instituted this rulemaking, in part, to make compliance with its regulations governing notices of termination less burdensome, it declines to obligate parties to include both the title and registration number or include other identifying indicia, as some commenters proposed. See Edell Howard Comments at 5–6; RIAA Comments at 10.

the accompanying fee and statement of service are received.⁶⁵ The Office proposed this change because assigning a later date of recordation due to a fee miscalculation or immaterial filing error could deprive a terminating party of the opportunity to exercise their rights if the date assigned falls on or after the effective date of termination.⁶⁶ In support of the proposed rule, some commenters offered justifications similar to the Office’s reasoning in the NPRM.⁶⁷ For example, Linda Edell Howard said the proposed change would avoid the “harsh consequences that can result where a submission is missing a required element,” which may not be discovered until after the effective date of termination.⁶⁸ Other commenters opposed the proposed rule, primarily out of concern that remitters will submit the required elements to record a notice “piecemeal.”⁶⁹ While NMPA did not oppose allowing remitters to retain their date of recordation when correcting “nonmaterial errors,” it expressed concern that the proposed change could result in parties failing to comply with the statutory service requirements and recommended that the statement of service be received before the effective date of termination.⁷⁰ Both MPA and RIAA opposed assigning a date of recordation before the effective date of termination if any element is received by the Office after the effective date.⁷¹ As an alternative, MPA proposed that an “incomplete package” should be promptly recorded as a “document pertaining to a copyright” under section 205 of the Copyright Act, the record annotated with the missing and/or pending element(s), and a

⁶⁵ 85 FR 34155.

⁶⁶ *Id.* at 34153.

⁶⁷ Edell Howard Comments at 5–6; NSAI Comments at 4 (noting “it is not uncommon for errors to be made or documents to be omitted during the filing” and the “termination window may close before the filer is even given notice that something is missing, inadequate or incorrect”); Recording Academy Comments at 2 (noting there are “innumerable clerical errors, unintended omissions, and other mistakes that could delay the timely recordation of a termination notice and force an author to lose the ability to effectuate termination”).

⁶⁸ Edell Howard Comments at 5–6.

⁶⁹ MPA Comments at 10; *see also* RIAA Comments at 10–11.

⁷⁰ NMPA Comments at 8–9.

⁷¹ MPA Comments at 10–14; RIAA Comments at 10.

thirty-day time limit imposed for the remitter to provide the missing element(s).⁷² Under MPA’s proposal, if any missing elements were received after the effective date of termination, the Office should refuse to record the notice.⁷³

After considering these comments, the Office is proceeding with the substance of the change proposed in the NPRM. The Office continues to believe that delinking the date of recordation from receipt of a complete submission is appropriate in order “to mitigate the harsh consequences that can result where a submission is missing certain required elements.”⁷⁴ To respond to the concerns of commenters who opposed this change, the Office clarifies its examination practices regarding incomplete recordation submissions. Where the statement of service is missing, the recordation specialist will correspond with the remitter to request it.⁷⁵ Likewise, where no fee is received or there is a balance resulting from underpayment (*e.g.*, the remitter miscalculated the number of works identified in the notice), the specialist will correspond.⁷⁶ In any event, whenever a recordation specialist corresponds with a remitter—whether to correct an immaterial error, obtain a statement of service, or ensure the fee is paid in full—a response must be received within forty-five days or the submission may be closed, *i.e.*, the document will not be recorded by the Office. In addition, remitters must certify under penalty of perjury that the recordation submission is “complete to the best of [the remitter’s] knowledge, information, and belief, and is provided in good faith.” To the extent a remitter attempts to “lock in” a date of recordation by intentionally submitting elements piecemeal, he or

⁷² MPA Comments at 14.

⁷³ *Id.* at 14.

⁷⁴ 85 FR 34153.

⁷⁵ Responding to NMPA’s concern about “grantors improperly submitting notices to the Office prior to serving them on grantees,” *see* NMPA Comments at 8–9, the Office agrees that such a submission would be improper because it would not comply with requirement that the copy of the notice “must be, be and certified to be, a true, correct, complete, and legible copy of the signed notice of termination *as served*.” *See* 37 CFR 201.10(f)(1)(i)(A) (emphasis added).

⁷⁶ The U.S. Patent and Trademark Office exercises similar discretion by permitting the fee to be submitted after the filing date of a patent application. *See* 35 U.S.C. 111(a)(3), (b)(3).

she presumably would be running afoul of this requirement. Thus, existing procedural safeguards help to minimize abuse and ensure that recordation submissions are not held open indefinitely. The Office will monitor the effect of this adjustment as it administers the recordation system for notices of termination.

In addition, the final rule makes one modification to the proposed rule by adding the phrase “a copy of” before “notice of termination.” This change, recommended by Authors Guild et al., aligns the regulation with the statutory language requiring “a copy of” the notice to be submitted for recordation and dispels any potential confusion that the original notice should be submitted to the Office.⁷⁷

III. Statements of policy on subjects of inquiry

As part of the NPRM, the Office sought public comments on two additional subjects of inquiry: (1) whether the Office should develop a sample form or template for use in preparing notices of termination; and (2) how the Office might address defective or untimely notices filed by third-party agents. In addition, some commenters offered proposals for regulatory change on various other termination-related matters. The Office addresses the comments received on these topics as follows.

A. Sample form or template

Many commenters supported the development of an optional, fillable form for use in preparing notices of termination.⁷⁸ For example, Authors Alliance offered its “wholehearted support” for a form, noting that termination rules are “complicated and formalistic,” while Authors Guild et al. opined that “[a]n online form that creators could fill out to generate a letter would be ideal.”⁷⁹ One commenter, however, opposed such a form, concluding that although “75% of the boilerplate language in the notices is

⁷⁷ Joint Comments of Authors Guild et al. at 6.

⁷⁸ See Authors Alliance Comments at 1; Joint Comments of Authors Guild et al. at 6–7; Copyright Alliance Comments at 4; MPA Comments at 15; NSAI Comments at 10; NMPA Comments at 10; RIAA Comments at 12–13.

⁷⁹ Authors Alliance Comments at 1–2; Joint Comments of Authors Guild et al. at 6.

conducive to the benefits of a template . . . the ‘meat and bones’ of the actual notice . . . is so fact-sensitive that trying to fill in blanks in specific sections of a form notice would prove futile and onerous.”⁸⁰

With respect to the specific nature of such a form, several commenters urged the Office to include detailed instructions and guidance “to help creators understand what information is required, where to find the required information, and how to proceed where there is uncertainty.”⁸¹ Others provided additional suggestions. NMPA recommended that the form distinguish between required and optional information.⁸² MPA stressed that it should be made clear that use of any form supplied by the Office to create a notice would not be determinative of a notice’s validity or legal effect, which could still be challenged by any party claiming the legal or formal requirements have not been met.⁸³ And the Copyright Alliance noted that grantors who elect not to use a sample form should not be penalized or disadvantaged.⁸⁴

The NPRM also inquired whether the Office should consider the development of other types of templates to assist terminating parties, such as an online notice builder that would allow parties to input information pertaining to the terminable grants, which would then be prepopulated into a draft notice. Commenters were generally supportive of this idea, though some expressed concerns about consequences stemming from user or system error. For example, NMPA observed that grantors may blame the notice builder for errors in notices and request “leniency in complying with their obligations under the statute or

⁸⁰ Edell Howard Comments at 8.

⁸¹ Authors Alliance Comments at 2; *see also* NMPA Comments at 10 (“[The form] could also be accompanied by clear and detailed instructions and guidance as to a remitter’s obligations under the Copyright Act and under the Office’s regulations, and could clearly state the requirements for service as well as the timeline for service, effective date of termination, and recordation”); RIAA Comments at 12–13 (suggesting a form follow the approach of questionnaires found in sections 2310.13(A)-(C) of the Compendium).

⁸² NMPA Comments at 10.

⁸³ MPA Comments at 15.

⁸⁴ Copyright Alliance Comments at 4.

regulations due to that reliance on the Copyright Office.”⁸⁵ Noting similar concerns, the Copyright Alliance supported a notice builder with the caveat that “there should be a prominent statement making grantors aware of the associated risks . . . and those who choose to use it should be required to assume those risks.”⁸⁶ Authors Guild et al. likewise proposed a disclaimer if a “fillable form” were to be integrated into the electronic recordation system, adding that the Office could “program[] automated alerts that would pop up if any information entered by the user in the termination form conflicts with information in the registration record” so that the remitter could correct any errors.⁸⁷

The Office will consider these helpful comments in connection with its development of further public guidance, such as developing a sample form and/or other online information or tools to assist in preparing notices of termination, together with enhanced educational materials. Meanwhile, the Office currently provides information about preparing, serving, and recording notices of termination—including charts that may be used to calculate the statutory windows for service and recordation under sections 203 and 304(c)—in the Compendium and on a dedicated webpage.⁸⁸ The Office encourages interested parties to consult those existing resources and stay tuned for future information. The Office plans to continue stakeholder outreach to assess the extent to which additional help text or other resources could be integrated into the online recordation system as development proceeds.⁸⁹

⁸⁵ NMPA Comments at 10; *see* RIAA Comments at 13 (“While we understand the potential appeal of an online notice builder, we are concerned that efforts will be made to blame the notice builder if grantors provide incorrect or inadequate information and the notice builder creates a deficient notice.”).

⁸⁶ Copyright Alliance Comments at 4.

⁸⁷ Joint Comments of Authors Guild et al. at 6–7.

⁸⁸ *See* Compendium (Third) sec. 2310; Notices of Termination, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/recordation/termination.html>.

⁸⁹ For information about collaboration and testing opportunities relating to the electronic recordation system pilot, contact the Office by email at recordation-pilot@copyright.gov.

B. Third-party agents

In the NPRM, the Office noted stakeholder concerns regarding third-party agents who fail to comply with legal requirements when serving or recording termination notices on behalf of copyright owners. Noting that such failures can jeopardize termination rights if not discovered in a timely manner, the Office requested comment on whether any regulatory changes should be considered to address these concerns.⁹⁰

The comments reflected some disagreement as to the pervasiveness of the problem and the appropriate means to address it. NMPA and RIAA suggested that the scope of the problem is unclear and cautioned against any regulatory change that would excuse untimeliness or other noncompliance with legal or regulatory requirements.⁹¹ In their view, the proper recourse for parties harmed by the actions or inaction of their agents is to seek redress through malpractice or other claims under agency law. Linda Edell Howard and NSAI, however, cited several examples of third-party agents who apparently failed to respond to Office correspondence about defective or incomplete filings with the result that the issues were not, and could not be, resolved before the termination window expired.⁹² To address the issue, NSAI proposed requiring third-party agents to provide complete contact information for the grantor, which would be verified by return-receipt mail upon receipt of the notice by the Office, and for the Office to copy the grantor on any subsequent correspondence with the agent.⁹³ Similarly, Edell Howard proposed revising Form TCS to allow remitters the option to provide contact information for any terminating party, for the Office to provide return receipts for notices submitted for recordation, and for the Office to copy the terminating party on any correspondence

⁹⁰ 85 FR at 34154.

⁹¹ NMPA Comments at 11; RIAA Comments at 13; *see also* MPA Comments at 15–16.

⁹² *See* Edell Howard Comments at 6–7; NSAI Comments at 2–3, 5–7.

⁹³ NSAI Comments at 7; *see* Copyright Alliance Comments at 4 (supporting NSAI's proposal).

sent to the remitter.⁹⁴ Edell Howard and NSAI further suggested that the Office could make in-process recordation submissions publicly available.⁹⁵ Authors Guild et al. suggested that Office could consider “a process whereby grantors may periodically designate and certify third-party agents using the [Electronic Copyright System].”⁹⁶

After considering these comments, the Office proposes no additional regulatory changes to address harm resulting from filing errors made by third-party agents. Instead, the Office will update its forms and practices by adding an optional field in both Form TCS and the electronic recordation system that remitters may use to provide e-mail contact information for any terminating party. This contact information, like all information provided as part of a recordation submission, will be included in the public record. Where party contact information is provided, recordation specialists will copy the party on any correspondence with the remitter about errors or omissions as well to inform them when the certificate of recordation is issued. The Office declines to make the provision of this information mandatory because the Office understands that some parties may retain agents in part because they do not want their contact information to be made public.⁹⁷ The Office likewise declines to require Recordation staff to affirmatively notify terminating parties by return receipt that a notice has been filed, as such an obligation would add to the existing administrative burden of processing paper notices, thereby undermining the efficiency of the process for participants. Additional commenter proposals to make in-process notices publicly available, to allow terminating parties to

⁹⁴ Edell Howard Comments at 9.

⁹⁵ *Id.* at 9; NSAI Comments at 7.

⁹⁶ Joint Comments of Authors Guild et al. at 7.

⁹⁷ NSAI suggested that “[t]o avoid the concern of disclosing personally identifiable information in the public record, grantor contact information should be redacted in the record and available only to the Copyright Office for administration purposes.” NSAI Comments at 7. Rather than selectively redact information provided as part of a recordation submission, which would make administration of this feature more onerous and thus expensive to remitters, the Office instead plans to make this field optional.

designate agents, or to notify terminating parties when a notice is submitted for recordation will be considered as development of the online recordation and public record pilot systems continues.⁹⁸

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final 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. Amend § 201.10:

a. By revising paragraphs (d)(1) and (e)(1);

b. In paragraph (f)(1)(ii)(A):

i. By removing “will” from the first and second sentences and adding in its place “may”, respectively; and

ii. By adding “on or” after “the date of recordation is”; and

c. In paragraph (f)(3), by removing “all of the elements required for recordation, including the prescribed fee and, if required, the statement of service, have been” and adding in its place “a copy of the notice of termination is”.

⁹⁸ Public comments included several other proposals to modernize various aspects of the recordation process that are outside the scope of the proposed rule and subjects of inquiry. *See, e.g.*, Authors Alliance Comments at 3 (proposing that the Office “consider developing or integrating tools that help authors understand the complex timing provisions governing notice and termination windows”); Edell Howard Comments at 3, 9, 10 (proposing, *inter alia*, that the Office allow the public to view recorded notices online and download certificates of recordation); NMPA Comments at 10 (proposing that works identified in notices be linked to the registration record); NSAI Comments at 8 (proposing, *inter alia*, that the Office might notify authors of when termination rights may be maturing or closing by using registration records). The Office will consider these proposals as its further regulatory and technology modernization efforts proceed, to the extent they are permitted by law.

The revisions read as follows:

§ 201.10 Notices of termination of transfers and licenses.

* * * * *

(d) * * *

(1) The notice of termination shall be served upon each grantee whose rights are being terminated, or the grantee's successor in title, by:

(i) Personal service;

(ii) First class mail sent or by reputable courier service delivered to an address which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title; or

(iii) Means of electronic transmission to:

(A) An e-mail address designated for service of notices of termination and/or legal process that is listed as such on the website of the grantee or successor in title in a location accessible to the public;

(B) An e-mail address provided to the terminating party by the grantee or successor in title, provided that the grantee, successor in title, or an agent thereof who is duly authorized to accept service on behalf of the grantee or successor in title expressly consents in writing to accept service at the address provided within thirty days before such service is made; or

(C) An e-mail address for the grantee or successor in title provided in accordance with instructions provided on the Office's website in a public directory that the Office in its discretion may establish and maintain.

* * * * *

(e) * * *

(1) Harmless errors in a notice, statement of service, or indexing information provided electronically or in a cover sheet shall not render the notice invalid. For

purposes of this paragraph, an error is “harmless” if it does not materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 203, 304(c), or 304(d), whichever applies.

* * * * *

Dated: February 8, 2021.

Shira Perlmutter,

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. 2021-03906 Filed: 2/25/2021 8:45 am; Publication Date: 2/26/2021]