



**BEFORE THE
U.S. COPYRIGHT OFFICE**

Modernizing Copyright Recordation

Docket No. 2017-7

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the U.S. Copyright Office’s Notice of Proposed Rulemaking on Modernizing Copyright Registration (“NPRM”), published in the Federal Register on May 18, 2017.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

The Copyright Alliance has long supported Copyright Office modernization of its Information Technology (“IT”) systems for services such as copyright recordation. Our members appreciate the efforts of the Office to update its regulations as a precursor to the design of the planned electronic recordation system. A move from a paper-based system to an electronic one will benefit remitters by making recordation easier, improving processing times, and reducing costs. It will also provide benefits to users of the recordation database and the general public in the form of more robust, up to date, and searchable ownership information.

Modernization Principles

As the Copyright Office amends its regulations and moves forward with development of its new system, we hope it keeps in mind two principles to guide its efforts:

1. The transition from a paper-based system to an electronic one should not require substantially more effort on the part of remitters, and

2. The regulations should not affect substantive law (whether in the form of new presumptions, new pitfalls, or implied penalties for failing to record).

We understand the Office will also consult with stakeholders as it gathers requirements and begins the development of its fully electronic, online system. Though outside the scope of this particular NPRM, we urge the Office to include as part of that process user advisory or focus groups for beta testing of the actual system to inform its features and user interface.

We submit the additional following comments in response to specific issues addressed in the NPRM.

Transfers of Copyright Ownership and Other Documents Pertaining to a Copyright

Electronic Submissions

The NPRM asks for comments on plans for online payment to be made through Pay.gov, whether or not to continue allowing remitters to pay through deposit accounts, and whether potential users of deposit accounts would be willing to pay a surcharge for the development and maintenance of an automated deposit account system. Several of our members who are engaged in high volume recordation of documents expressed concerns here. The current deposit account system allows users to set up deposit accounts for separate business units or projects and receive regular monthly statements detailing all transactions for each account. This is not possible through Pay.gov, which instead provides an individual email receipt for each transaction and is designed more around occasional, one-off transactions. While acceptable for smaller entities and individuals, the transition to Pay.gov would greatly increase recordkeeping burdens and administrative costs for members engaged in higher volume usage.

The question of whether potential users of deposit accounts would be willing to pay a surcharge for the development and maintenance of an automated deposit account system itself raises too many questions to answer in principle. For example, how would the surcharge work and would it be per transaction, per deposit account, or per some other basis? We also question the extent to which a surcharge is necessary given that the Office currently maintains deposit accounts, in what is described as “a largely manual, offline process,” and should realize staff and administrative savings if it transitions to an automated deposit account system.

Originals, Copies, and Actual Signatures

The NPRM “proposes defining ‘actual signature’ [under section 205(a)] as any legally binding signature, including an electronic signature as defined by the E-Sign Act.” We agree with the Office’s reasoning behind this proposal and strongly support the change. A number of our members engage in fully paperless or digital workflows, so the wet signature requirement occasionally creates unnecessary burdens. However, we would ask that the Office does not create any requirements above and beyond what is required in the E-Sign Act when it implements this rule.

Redactions

The NPRM would require remitters who seek to record redacted documents, at the request of the Office, “to supply the Office with an unredacted copy of the document or additional information about the redactions” for purposes of review. The transmission and storage of such documents by the Office raises security and privacy concerns. How does the Office propose to address those concerns? What will the Office do with such documents and information once they’ve been reviewed? It is important that the interests of the remitter in maintaining confidentiality and security of their sensitive information is weighed against the purpose of providing an unredacted version. A general obligation to provide such a document at the request of the Office does not appear to take the interest of the remitter into account. Also, it is unclear from the NPRM what the consequence of failing to comply with such a request would be.

English Language Requirement

The NPRM would require English translations of non-English language documents to be accompanied by the signature of “the individual making the translation.” We note here the availability of software and automated translating services and suggest the Office consider the use of them as satisfying the English language requirement, either in this NPRM or a future one.

Indexed Information

We agree with the Office’s inclination not to list specific categories of indexing information in its regulations. While we have no opinion on what indexing information the Office should ask remitters to provide, we reiterate our position that provision of such information beyond what is required by statute should remain voluntary, with no legal effect on remitters who do not provide such information.

Parties Bear Consequences of Inaccuracies.

We ask the Office to consider including some mechanism for expunging inaccurate or fraudulently filed documents under circumstances where there is no “correct” document to be filed. For example, a document may be filed that contains a typo in a registration number that actually refers to a work by an unrelated copyright owner. The unrelated copyright owner has no document to say the recorded transaction did not take place as to her work but has to bear the consequences of that inaccuracy under the NPRM.

The NPRM states that a corrected document will be “treated as any other first-time-submitted document.” We invite the Office to consider clarifying what effect this would have on constructive notice. Presumably, a party would not have constructive notice of facts not present on an original document but on a corrected document before the time the corrected document is filed. However, less clear is what effect filing a corrected document would have on correct facts that are present in the original document. Preferably, constructive notice would attach as to those facts from the date the original document is filed.

Public Availability of Recorded Documents

We agree with the Office's plans to make all documents recorded available to the public through its online catalog subject to its proposed redaction rules. We recommend, however, that the Office provide some sort of watermark or other indicator on recorded documents that have been electronically submitted to indicate that they have been officially recorded. This will ensure that such documents are identifiable as recorded documents in the event they are made available outside the Office's recordation database.

Recordation Certificate and Returning of Document

We support the Office's plans to email recordation certificates and stamped copies of electronically submitted documents to remitters in its new system. As part of this new process, we ask that the Office consider putting the title of the work in the subject or "regarding" line of any such emails so that the subject matter is readily identifiable.

The NPRM states that for electronic submissions, "the Office intends to discontinue printing and mailing certificates of recordation and stamped copies of recorded documents once the new system is launched", noting that this will be "less expensive" and "will help bring down the overall recordation filing fee," though it will still make such paper documents available to electronic filers for an additional fee. We support this approach with one adjustment: because the provision of paper certificates and stamped copies of recorded documents is currently included in the recordation fees, the Office should continue to provide such documents for electronic filers without an additional fee until it has reduced the overall recordation filing fee.

Constructive Notice

The NPRM states that it "makes 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." (Emphasis added). We respectfully disagree with the Office's interpretation of 205(c). The statute requires, for constructive notice to attach, "the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title *or* registration number of the work." (Emphasis added). The Office's interpretation that *both* title and registration number are required for constructive notice sets a higher threshold than the statute requires, which, by using the disjunctive "or", indicates that *either* the title of the work *or* the registration number of the work is sufficient for constructive notice to attach.

In some instances, our members record documents related to copyrighted works prior to their completion, in which case no registration is yet possible. The Office's interpretation of 205(c) would deprive remitters in these instances of the constructive notice that the statute entitles them to. For example, SAG-AFTRA obtains its secured interests in motion picture collateral after a producer makes their project signatory to the collective bargaining agreement—typically one to three weeks before the project is to begin principal photography. As part of SAG-AFTRA's due diligence before taking the security interest, the union requires the producer to submit for review the chain-of-title along with written proof that the Form PA for the film's

screenplay has been received for recording by the USCO. In most cases, the producer submits the Form PA recording at the time SAG-AFTRA requests proof of same, or has submitted it not long before beginning the signatory process. This means that there is no registration number yet available for the work, and that there may not be a registration number available for some time. This in turn means that SAG-AFTRA would not be able to record an effective security interest until the registration number is released.

Since the taking of secured interests involves issues of lien priority based on time of filing, this would seriously impair SAG-AFTRA's ability to obtain liens of the proper priority. Overall, the registration number requirement could shut down the union's ability to continue the practice of taking secured interests, which it does in high volume—over 600 per year. The secured interest program is critical to enhanced protection of union member interests. Although SAG-AFTRA could still record our secured interests without the registration number under the Office's proposed rule, the union would be denied the benefit of constructive notice, which is essential for a secured creditor.

Such a requirement can create hardships or prove highly difficult to comply with in other circumstances as well. For example, a document may simply state that "all assets" (including registered copyrighted works) of a particular entity are assigned to the remitter, without any schedule listing individual works and any record of the registration numbers of those works.

We respectfully request that this requirement be reconsidered, and that documents be permitted to reference either the title of the work or the registration number, consistent with the language of 205(c). We recognize and support the fact that the Office is looking for the most efficient way to successfully cross-reference all filings, but its requirement could deprive many remitters of the benefits of constructive notice that they rely on.

Notices of termination

Public Availability of Recorded Notices

Our members do not see any need for posting actual notices of termination in addition to the indexed information that would be made part of the Office's online public catalog, given that "all pertinent information contained in a notice of termination is contained in the indexed information."

Conclusion

We thank you for the opportunity to participate in the proposed rulemaking on modernizing copyright registration and look forward to reviewing the Office's final rule and working with the Office as it designs and develops its electronic recordation system.

Respectfully submitted,

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