



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

**Modernizing Recordation of Notices of
Termination**

Docket No. 2020–10

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Proposed Rulemaking and Notification of Inquiry](#) (“Notice”) published by the U.S. Copyright Office in the Federal Register on June 3, 2020, regarding proposed amendments to regulations governing the recordation of notices of termination, and related practice updates.

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.

A. Discretion to Record Untimely Notices of Termination

The Office proposes amending the regulations to grant it discretion to record certain untimely notices of termination. Particularly as it relates to a notice that is premature on its face,

we believe that the regulations should continue to require that the Office refuse such a notice.¹ Recording a premature notice would be a disservice to grantors who would otherwise have no way of realizing their mistake in time to cure the error. Instead, the Office should refuse the notice and promptly notify the grantor of the refusal and the reasoning. Likewise, the Office’s proposal would present challenges for grantees as well. Although recordation does not speak to the validity of the notice, once the Office records an untimely notice, the grantee would have the burden of challenging the validity in federal court rather than being able to rely on the Office’s refusal of the notice to begin with.

The Copyright Alliance encourages the Office to explore new ways to help educate grantors about the requirements for terminating a grant, including the overall timeline and proper window for serving and recording notices. For example, to its credit, in recent years the Office has begun hosting webinars to help distill complex issues—regular webinars and on-demand videos on termination might also be beneficial especially for individual creators.

B. Manner of Service

The Copyright Alliance supports the Office’s proposal to amend regulations to clarify that acceptable manners of service include delivery by reputable courier services like FedEx, UPS, and DHL. However, it is essential that acceptable manners of service—whether through the postal service or a private courier—be limited to those that are tracked by the postal or courier service in order to provide greater transparency for everyone involved. Since tracking is not available for first class mail, we believe that the Office should eliminate first class mail as an acceptable manner of service and permit other services offered and tracked by the U.S. Postal Service (USPS), like priority mail.²

Services that are tracked but require a signature also may not be appropriate. Assuming that the regulation is drafted to require *delivery* using the particular method as opposed to

¹ We take no position on whether the Office should have discretion to record a notice that is late on its face.

² If the Copyright Office eliminates first class mail as an acceptable manner of service and/or permits other services offered and tracked by the U.S. Postal Service as acceptable manners of service, 37 C.F.R. §201.10(f)(1)(i)(B) would need to be updated to reflect those changes. *See* 37 C.F.R. §201.10(f)(1)(i)(B) (“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.”).

sending—as the proposal is currently drafted with regard to “reputable courier services”³—the fact that services like certified mail will not allow delivery to be completed if the recipient is absent (and following multiple attempts the onus falls on the recipient to retrieve the parcel), permitting these as acceptable manners of service could put grantors in a precarious situation. At the very least, if the Office does allow such manners of service, grantors should be made aware of the risks associated with these options.

The Office also proposes permitting service to be accomplished via electronic transmission (i.e. email) if the grantee expressly consents. While this is an interesting proposal, it raises a number of questions and concerns that should be fully considered and appropriately addressed before it could be implemented. For example: What would constitute express consent? Would the Office look for general consent or consent on a case-by-case basis? Would the consent be effective indefinitely or for a limited period of time (e.g. six months)? How would the risk that an email goes to a junk or spam folder be accounted for? Could consent be terminated, and if so, how and under what conditions? Who has authority to consent?

C. Identification of a Work

The Copyright Alliance believes that the Office should maintain its current regulations requiring the grantor to include the title of the work, and encouraging but not requiring the registration number. In our analysis, we have been unable to identify what need would be addressed by deviating from the current practice. It is unclear why a grantor would be more readily able to produce the registration number (and do so accurately) than the title, especially given that both pieces of information are listed on the registration certificate. It is also beneficial for grantees to have some expectation of consistency as they develop practices and processes for handling termination notices. Finally, as the Notice states, “if a work is identified only by registration number in a notice and there is an error in the number, the error may materially

³ “In paragraph (d), add ‘or by reputable courier service delivered’ after ‘by first class mail sent’...” *See* Modernizing Recordation of Notices of Termination, 85 Fed. Reg. 34,150, 34,155 (proposed Jun. 3, 2020) (to be codified at 37 C.F.R. pt. 201).

affect the adequacy of the information.”⁴ For these reasons, the Office should maintain its current regulations regarding identification of a work.

D. Notices Relating to Multiple Grants

The Copyright Alliance is generally supportive of the Office’s practice of recording notices of termination relating to multiple grants, as it helps make the process more efficient and cost-effective for grantors (who are often individual creators and small businesses). However, we request that the Office clarify how it addresses/will address instances in which there is a material error in the notice relating to only one of the multiple grants. Would the entire notice be invalid or would the error extend only to the particular grant?

E. Sample Form or Template for Notices of Termination

The Copyright Alliance supports the Office developing an optional sample form or template for notices of termination, with two caveats: (i) with regard to a notice builder (as opposed to a static form), there should be a prominent statement making grantors aware of the associated risks (e.g. user error or technical glitches that result in the wrong questions or fields being populated) and those who choose to use it should be required to assume those risks; and (ii) a grantor should not be penalized or disadvantaged in any way if they elect not to use the sample form or template. We would also encourage the Office to use the sample form as an opportunity to include clear instructions to help educate grantors about the requirements for terminating a grant.

F. Third-Party Agents

The Copyright Alliance supports the proposal articulated by the Nashville Songwriters Association International to require that third-party agents include contact information for the grantor, and that any correspondence from the Copyright Office to the agent copy the grantor. Of course, failure on the part of the agent to include the contact information (or the Copyright Office to copy the grantor) should have no bearing on the validity of the notice or any of the obligations required by the statute. It should, however, serve to encourage and facilitate better communication between the Office and the grantor when third-party agents are involved.

⁴ Modernizing Recordation of Notices of Termination, 85 Fed. Reg. at 34,153.

Conclusion

We thank you for the opportunity to submit these comments. Please let us know if we can provide additional input or answer any further questions.

Respectfully submitted,

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August 5, 2020