

The MPA's members are high-volume users of the Copyright Office's registration and recordation systems, and also rely heavily on the Office's hard-copy public records and online database. The MPA's members are also frequent licensors/assignors and licensees/assignees of copyrighted works, and rely on the Copyright Office's systems in the course of conducting a wide variety of transactions. As such, we thank and commend the Office's efforts to modernize its systems. These modernization efforts will benefit not just the MPA's members, but the entire ecosystem of motion picture and television producers, financiers, licensors, and licensees, who rely on a well-functioning copyright system that enables the production and wide distribution of content that entertains and informs the public.

As the Office knows, the Copyright Act's heavily negotiated termination provisions were enacted "as a practical compromise [to] further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved." H.R. Rep. No. 94-1476 at 124 (1976). The MPA welcomes modernization and improvement of the regulations related to these important provisions. However, the MPA urges that any changes to the termination regulations not upset the carefully negotiated equilibrium established by Congress in 17 U.S.C. §§203 and 304(c). As described in detail below, while MPA embraces certain of the proposed changes as an improvement, other rules, if adopted, would be devastating to its members and would upset the equilibrium referenced above.

The MPA's members routinely acquire rights to copyrighted material created or owned by third parties (e.g., books, screenplays, music, etc.), the grants of which may be subject to termination under 17 U.S.C. §§203 or 304(c). It is vitally important to the MPA's members that they receive actual, accurate, and timely notice of grantors'² exercise of termination rights.

² As used herein, the term "grantor" refers both to the original grantor and to a successor who seeks termination.

Before making the risky and expensive decision to produce a major motion picture or television program, the MPA's members engage in careful analysis of the relevant rights, and only "greenlight" a project when they are confident that they own or have secured all necessary rights. Part of this process is analysis of the potential for a grantor to terminate any such rights before production of the movie or TV program is complete. Performing such analysis requires complete, accurate records indicating whether grantors of relevant rights have exercised, or may exercise, purported termination rights. Predictability is paramount, as tens or hundreds of millions of dollars may be at stake in such rights analysis undertaken with respect to the use of a valuable piece of copyrighted material in a major motion picture.

The Copyright Act and relevant regulations provide two separate means to inform grantees³ of grantors' exercise of termination rights: 1) service of a valid termination notice; and 2) timely recordation of such notice.⁴ In theory, service should provide grantees actual notice of purported termination. In practice, however, the service requirement, as defined by the statute and regulations, does not always result in actual notice. That is because the regulations require nothing more than service "by first class mail sent to an address, which after a reasonable investigation, is found to be the last known address of the grantee or successor in title."⁵ As a result, notices may be mailed to the wrong entity; to an outdated, now invalid, address; or to a general address for a large corporate entity, which may result in the envelope containing the notice not being directed to the appropriate personnel. Thus the service requirements of the statute and regulations *do not* guarantee that the grantee will gain actual knowledge of the

³ As used herein, the term "grantee" refers both to the original grantee and to any successor to any of the potentially terminable rights.

⁴ See 17 U.S.C. §§203(a)(4), 304(c)(4); 37 C.F.R. §201.10(d), (f).

⁵ 37 C.F.R. §201.10(d)(1).

purported termination – and, contrary to the intent of the statute, grantees thus cannot necessarily rely on the apparent absence of service in concluding that termination has not been, or will not be, effected.

Given these shortcomings in the service process, the timely recordation of termination notices takes on increased importance. In many cases, the MPA’s members learn of purported termination of rights not through service of a termination notice, but instead when the information becomes available on the Copyright Office’s online public catalog or included in a copyright search report. For this reason, it is crucial that the recordation process for termination notices provide a complete, robust body of information that enables grantees to learn of termination notices about which they may not have been aware through service alone, and to evaluate the validity of the purported terminations.

Lastly, while we acknowledge the Office’s concern that the “required contents of the notice must not become unduly burdensome to grantors, authors, and their successors,”⁶ we ask that the Office also recognize the substantial equities on grantees’ side. The termination process, which can result in a grantee’s loss of extremely valuable rights, obtained through negotiation and valid contractual agreements, is a rare statutory intrusion upon the sanctity of contract. And the process, especially given that it permits a long gap – up to ten years – between service of a notice and the required recordation, can leave grantees like the MPA’s members in an extended period of limbo, when they are uncertain whether they possess the necessary rights to produce a movie or television program. Adherence to the statutory deadlines and other requirements of the termination process helps mitigate (though does not eliminate) this uncertainty, while “relaxing”

⁶ NPRM, 85 Fed. Reg. at 34,151 (quoting Termination of Transfers and Licenses Covering Extended Renewal Term, 42 Fed. Reg. 45,916, 45,918 (Sept. 13, 1977)).

the rules, including in several ways suggested in the NPRM, and described in more detail below, can significantly prejudice grantees and, as discussed in section II.E. below, alters the statutorily prescribed deadlines, which is beyond the regulatory authority of the Office.

II. COMMENTS ON THE PROPOSED RULE

A. Timeliness

Timely service and recordation of a termination notice are statutory requirements that must be observed for a termination to be effective.⁷ We do not understand the Office to be recommending relaxation of those statutory requirements, which would in any event be beyond the Office’s regulatory authority. The NPRM proposes amending the regulation to state that the Office “may” refuse to record untimely notices, replacing the mandatory “will” in the existing rule. We emphasize that, absent unusual circumstances, the Office should maintain its practice of refusing to record notices that appear on their face to be untimely. As the NPRM states, the Office should only deviate from its practice of refusing to register untimely notices “if equitable circumstances warrant,” and we urge the Office to exercise the discretion it is seeking particularly cautiously in this context. Recording an untimely notice serves no purpose, and cannot ultimately help a tardy remitter, as the act of recordation does not and cannot render an otherwise untimely notice valid.⁸ Additionally, recordation of untimely notices will only serve to create confusion in the Office’s public record when third parties (who will typically not have access to the documents evidencing the grant(s) at issue) attempt to determine whether a notice is effective.

⁷ See 17 U.S.C. §§203, 304(c) (mandating service within five-year window, and recordation “before the effective date of termination, as a condition to its taking effect”).

⁸ NPRM, 85 Fed. Reg. at 34,151& n.11 (quotation marks omitted) (quoting 37 CFR §201.10(f)(4) and citing *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1117–18 (9th Cir. 2015)).

If the Office remains inclined to adopt the proposed rule, 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, not as an indication that routinely recording untimely notices is necessary or appropriate. Notably, it is difficult to envision fact patterns where “equitable circumstances” would warrant an apparently untimely notice to be recorded. The only example of such “equitable circumstance[]” provided in the NPRM involves so-called “gap grants.” However, the existing regulations already provide for the recordation of “gap grant” termination notices.⁹

B. Harmless Errors

The MPA agrees with certain principles set forth in Section II.B. of the NPRM regarding harmless errors. However, we believe that the revision to 37 CFR §201.10(e)(1) proposed by the Office unnecessarily goes beyond what is proposed in the text of the NPRM, and is overbroad and potentially ambiguous. The Office’s proposed changes are as follows:

(1) Harmless errors in preparing, serving, or seeking to record a notice that do 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, or that do not materially affect, in the Office’s discretion, the Office’s ability to record the notice, shall not render the notice invalid.

The Office’s proposed language suggests that errors in the *manner of service itself* (as distinct from errors in the documents) may be treated as harmless. But manner of service is a technical procedure, for which strict compliance is typically required in the analogous litigation context.

See Rutter Group Prac. Guide Fed. Civ. Proc. Before Trial Nat Ed., Ch. 5-I, Challenging

Defective Service (“In contrast to motions attacking the form of summons, challenges to the

⁹ 37 CFR §201.10(f)(1)(ii)(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.”).

manner of service are interpreted strictly: A liberal construction of Rule 4 ‘cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had.’”) (quoting *Mid-Continent Wood Products, Inc. v. Harris*, 936 F2d 297, 300 (7th Cir. 1991)). Consistent with the requirement for strict compliance with rules regarding the manner of service, MPA suggests a different revision to 37 C.F.R. §201.10(e)(1), which is more narrowly tailored to the Office’s concerns expressed in the NPRM:

- (1) Harmless errors in a notice or statement of service that do 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, and that do not materially affect, in the Office’s discretion, the Office’s ability to record the notice. shall not render the notice invalid.

C. Manner of Service

Determining the optimal manner of service of termination notices may seem a mundane and technical issue, but it is vital to maximizing the probability that service results in actual notice to grantees. Whether service imparts actual notice to grantees is particularly important in light of grantees’ ability under the statute to wait up to a full decade between service and recordation. *See* 17 U.S.C. §§203, 304(c) (requiring service between two and ten years before the effective date of termination, but mandating recordation of the notice merely “before the effective date of termination”). If service does not result in actual notice to a grantee, the grantee may only learn of an attempted recordation through a search of the Office’s online database years after it was led to believe, based on the apparent absence of service of a notice, that the grantor had *not* exercised its termination rights. Such scenarios may result in great prejudice and expense to the MPA’s members, which may have spent millions of dollars developing a project in reliance on the belief that necessary rights had not been terminated, only to learn late in the day that a grantor has claimed that it served a notice years before, and is now recording that notice. The rules governing manner of service should be calibrated to avoid such results.

The existing rule permits service by personal service or first class mail only.¹⁰ The Office proposes in the NPRM to permit service “by reputable courier service” (e.g., FedEx, UPS, and DHL) as well. The MPA agrees that service by such courier services should be permitted. Such services provide independently verifiable records of the sending and receipt of each package, which can be invaluable in resolving disputes over whether service was properly effected. For that very reason, the MPA further proposes to amend the rule to eliminate the use of regular first class mail as an option. Rather, we suggest that service must be made using a means that tracks sending and receipt of the package, which would include US Postal Service Certified Mail or Priority Mail, as well as the private courier services noted above.¹¹

The MPA agrees in principle that service by reliable electronic means should be permitted, if the grantee consents. But the MPA is unable to support the proposed regulation permitting email or other electronic service at this time, because such service methods present a number of practical questions about their ability to reliably reach and impart actual notice to the grantee that are simply not addressed or resolved by the regulation. Those questions include: When must the consent be granted?¹² Who has the authority to grant such consent? How should the rule address situations where the intended recipient does not receive the email, because, for example, it is blocked by a spam filter or other security measure? And would it make sense for

¹⁰ 37 C.F.R. §201.10(d)(1).

¹¹ While these services cost more than first class mail, the amounts will nearly always be trivial in relation to the typical value of a copyright, the grant of which a grantor believes is worth terminating decades after the initial transaction. And the 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.

¹² Notably, 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. Thus “consent” to email service at the time of the grant would likely be illusory, as the grantee would not know the email address or individual to whom service should be directed decades in the future.

the Office to maintain an online database of grantees that have agreed to accept service by email or other electronic means, akin to the directory of agents designated to receive notifications of claimed infringement under 17 U.S.C. §512? However, we do believe that these practical issues can be resolved, and are willing to work with the Office and other stakeholders with the goal of incorporating reliable electronic service into a new regulation.

In light of the foregoing, the MPA proposes that 37 C.F.R. §201.10(d)(1) be amended as follows:¹³

- (1) The notice of termination shall be served upon each grantee whose rights are being terminated, or the grantee's successor in title, by personal service, ~~or by United States Postal Service Certified Mail or Priority Mail, or by reputable courier service first class mail~~ sent to an address which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title.

D. Identification of Work

The Office proposes amending 37 C.F.R. §201.10(b)(2)(iv) as follows:

- (iv) For each work to which the notice of termination applies, the title ~~or the original copyright registration number~~ of the work-, ~~or both, if possible and practicable,~~ and the name of the author or, in the case of a joint work, the authors who executed the grant being terminated; ~~and, if possible and practicable, the original copyright registration number~~

The Office's proposed revision eliminates the current rule's requirement that the notice identify the title, making it merely an option, as long as the grantor includes the registration number. The MPA respectfully opposes this proposed change. It is vitally important that the notice include the title. While it is helpful for the notice to *also* include the registration number, and the rule should continue to encourage grantees to include it, we oppose allowing the grantor to include *only* the registration number. To explain: If the notice includes only the title of the work (but not the

¹³ If the Office agrees that first class mail should be eliminated as a service option, the reference to first class mail in 37 C.F.R. §201.10(f)(1)(i)(B) should be replaced with references to the newly permitted delivery methods. *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.").

registration number), the grantee can typically still accurately identify the work (especially when analyzed along with the other required information included in the notice), even if there is a minor error regarding the title. But if the notice includes the registration number but *not* the title, and there is an error in the registration number, it may be extremely difficult for the grantee to identify the work at issue. Moreover, it is difficult to conceive of a situation where the grantor would know the registration number of a work, but not its title.

The MPA sees no reason why the requirement to list the title of the work should be eliminated, and urges the Office to leave 37 C.F.R. §201.10(b)(2)(iv) as is.

E. Date of Recordation

The MPA believes that the regulations should, as they have since 1977, continue to set the date of recordation as “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.” 37 C.F.R. §201.10(f)(3). The existing rule is clear, easy to follow, unambiguous, and consistent with the statute’s deadlines and with the rules governing other recordings¹⁴ as well as registrations.¹⁵ By contrast, the Office’s proposed change would permit a grantee to submit the required elements piecemeal over some unspecified and extended period of time, including beyond the effective date of the termination. As the Office knows, the Act expressly requires recordation “before the effective date of termination, *as a condition of its taking effect.*” 17 U.S.C. §§203(a)(4)(A) & 304(c)(4)(A) (emphasis added). Thus, to the extent the Office’s proposal would allow recordation to be completed at a time beyond the deadline set by the

¹⁴ See 17 U.S.C. §205.

¹⁵ See 17 U.S.C. §410(d) (“The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.”).

statute, MPA respectfully submits that such change is beyond the Office’s regulatory authority.

We oppose any such change for the following reasons:

(1) In drafting the statute, Congress provided grantors decades to prepare for termination, and a five-year window in which to select the termination date, but included the eminently reasonable requirement that the notice be recorded in the Copyright Office by a date certain, *i.e.*, **prior** to the effective date.

(2) Congress imbued the Office solely with the authority to prescribe by regulation the requirements with respect to the “form, content, and manner of service” of the termination notice itself.¹⁶ It did not grant the Office the authority to alter the statutory dictates defining the timing and requirements for the recordation of documents under section 205. For example, section 205(b) provides: “The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with certificate of recordation.” Thus, the Office cannot deem a notice of termination to be “recorded” merely “at the time the notice of termination is received” if it is not accompanied by the designated fee or statement of service. Moreover, the Office’s proposed changes remove the incentive to record the notice as soon as practicable after service, when there is still the possibility of addressing any deficiencies in the material sent to the Office as part of the recordation package, to the detriment of both the grantor and grantee, as well as to the general public, all of whom benefit from prompt recordation. The Office’s proposed changes erode the procedural safeguards written into the statute that ensure grantees know of the grantor’s attempt to terminate their rights.

¹⁶ 17 U.S.C. §§203(a)(4)(B), 304(c)(4)(B).

In the NPRM, the Office states that it believes recordation of termination notices should be accorded different treatment than recordation of other documents:

in light of key differences between the recordation of notices of termination and the recordation of other documents pertaining to copyright. In the context of termination notices, it is a statutory requirement that grantees receive actual notice before a copy of the notice is recorded with the Office. Because of this, the availability of the notice in the Office's public records is unnecessary to ensure that a grantee has adequate notice of the author's intention to terminate.¹⁷

The MPA respectfully disagrees with this justification. First, the statement fails to mention the "statutory requirement" that recordation be complete *prior* to the effective date of the termination "as a condition to its taking effect." 17 U.S.C. §§203(a)(4)(A) & 304(c)(4)(A). Second, the statement that "[i]n the context of termination notices, it is a statutory requirement that grantees receive actual notice before a copy of the notice is recorded with the Office" is not accurate. Sections 203(a)(4)(A) and 304(c)(4)(A) of the Copyright Act, which the NPRM cites for this proposition, do *not* require that the grantee receive "actual notice." Rather, those provisions merely require that the grantor serve the notice in the specified time period. In theory, such service should provide actual notice. However, in practice, service sometimes does not result in actual notice to the grantee, for the reasons explained in Section I, *supra*. Thus the MPA emphatically disagrees with the Office's conclusion that "the availability of the notice in the Office's public records is unnecessary to ensure that a grantee has adequate notice of the author's intention to terminate." Not only does this statement ignore the statute's express requirement of timely and complete recordation, but also, contrary to the Office's reasoning, because of the

¹⁷ 85 Fed. Reg. at 34,153 (footnote omitted).

inadequacies of the service process, the availability of the notice in the Office’s public records is *crucially important* in ensuring “that a grantee has adequate notice of the author’s intention to terminate.” And even if the Office changes the manner of service as the MPA proposes above in section II(C) to help ensure that service imparts “actual” notice, it is still crucially important for a grantee to have as much certainty as possible regarding whether a grantor has properly effected timely recordation – the final step in terminating the grantee’s rights.

Second, there is no principled basis to treat the recordation of termination notices differently than other recorded documents and registrations. There are other instances in which there are “potentially severe consequences” for failing to comply with recordation or registration deadlines. For example, with respect to conflicting transfers, if the prior grantee fails to timely record its grant before a subsequent grantee records a conflicting grant, the subsequent grantee’s grant will prevail (assuming all other conditions under section 205(d) are met), and the prior grantee will lose all of its rights pursuant to its now worthless grant.¹⁸ Another example, with respect to registration: if the copyright owner fails to submit all items necessary for registration within three months after first publication of the work or one month after the copyright owner has learned of the infringement, the copyright owner forfeits its ability to recover attorney’s fees and statutory damages.¹⁹

The MPA therefore strongly opposes the Office’s proposed changes to 37 C.F.R. §201.10(f)(3).

¹⁸ See 17 U.S.C. §205(d).

¹⁹ See 17 U.S.C. §412.

If the Office is nonetheless inclined to amend §201.10(f)(3) to address what it views as the “potentially severe consequences”²⁰ of the 43-year-old existing rule, any such amendment must not result in extending a grantor’s statutory deadline to complete recordation of the termination notice past the effective date of termination. The Office should continue to reject as untimely any recordation that is not completed prior to the effective date of termination stated in the notice. Instead, the MPA suggests that such amendment be directed at incentivizing prompt and complete recordation, and at providing more timely public notice of an intent by grantors to terminate as follows. First, when the Office receives an incomplete package containing a termination notice to be recorded, it should promptly post the notice on the public record as a “document pertaining to a copyright,”²¹ with a notation indicating the missing or pending element(s). Second, the rule should include a time limit of 30 days after receipt of a communication from the Office noting a deficiency by which the grantor must provide the Office with the missing element(s). The Office should refuse to record the notice if the grantor fails to furnish the necessary elements before the effective date of termination, as mandated by the statute.

²⁰ The NPRM refers to the “*potentially* severe consequences” of the existing rule. (Emphasis added.) But it is not clear to the MPA’s members that the existing rule has resulted in any *actual* severe consequences. The MPA respectfully suggests that before making such a sweeping change to a 43-year-old rule, it would be appropriate for the Office to seek evidence about the extent of the purported consequences of the existing rule.

²¹ See, e.g., 37 C.F.R. § 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.”).

III. EXAMINATION PRACTICES FOR NOTICES RELATING TO MULTIPLE GRANTS

The MPA generally agrees with the Office's position regarding multiple grants included in a single notice, including the proviso that the Office "will not record notices involving multiple grants where there is no overlap of either a grantee or a work across the various grants."

IV. ADDITIONAL SUBJECTS OF INQUIRY

A. Sample Form or Template for Notices of Termination

The MPA has no objection to the Office creating optional sample forms or templates for notices of termination, provided the use of such forms or templates is not determinative of the notice's validity or legal effect. The use of the Office's form or template should be without prejudice to any party claiming that the legal or formal requirements for effecting termination have not been met, including before a court of competent jurisdiction.

B. Third-Party Agents

While the Office is not at this time proposing any changes to the regulations to address third-party agents who assist grantors in exercising their termination rights, its discussion of the use by grantors of such agents suggests that it is contemplating some degree of relaxation of the regulations in instances where the agent errs, to the detriment of his or her client (i.e., the grantor). MPA would vigorously oppose any such move. All grantors, whether or not represented by an agent, should be required to follow the same rules, both substantive and procedural. There should not be a rule according special dispensation to grantors who are represented by agents, as such a rule would unfairly disadvantage grantees, and bely the point of hiring an agent to represent the interests of the grantor. Moreover, such a rule would be inconsistent with the analogous rule in other legal contexts, where compliance with deadlines and other requirements is not excused where a client's attorney erred. It is well established that when an attorney misses

a deadline, the remedy is not relief from the deadline, but, rather, a malpractice claim by the client against his lawyer. *See, e.g., Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 754 (7th Cir. 2015) (Easterbrook, J.) (“*Link v. Wabash R.R.*, 370 U.S. 626, (1962), holds that litigants are bound by the acts and omissions of their chosen agents, including lawyers, and that legal bungling therefore does not justify reopening a judgment. The Supreme Court added in *Société Internationale v. Rogers*, 357 U.S. 197 (1958), and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, (1976), that the intentional misconduct of lawyers likewise is imputed to their clients.... When lawyers fail, the remedy is malpractice litigation against the wrongdoer, not more litigation against an innocent adversary in the original litigation.”). There is no reason for the Copyright Office to deviate from this well-settled principle.

The MPA and its members thank and commend the Office for its work toward modernizing the registration and recordation systems, and appreciate this opportunity to provide our comments in response to the NPRM/NOI. We look forward to providing further input and working with the Copyright Office going forward.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ben Sheffner', with a long horizontal line extending to the right.

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