Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: Gap in Termination Provisions	Docket No. RM 2010-5

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") submits these Comments in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") regarding recordation of purported notices of termination. *See* 75 Fed. Reg. 72,771 (Nov. 26, 2010). In the NPRM, the Office indicates its willingness to accept for recordation under Section 203 of the Copyright Act a notice purporting to terminate a grant agreed to before January 1, 1978 if the work that is the subject of the grant was created on or after January 1, 1978 (sometimes referred to herein as a "Specified Grant"). RIAA submits these Comments because it believes that the Office's basic approach under the NPRM is reasonable, but has concerns about whether the proposed rule might be misinterpreted to give the Office's recordation decisions greater weight than is intended or appropriate. Accordingly, RIAA suggests modifications to the proposed rule that it believes are consistent with the Office's expressed intentions.

RIAA's Interest in this Proceeding

RIAA is the trade organization representing the major music companies that create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. Most sound recordings are owned by record companies as works made for hire under applicable contracts and so are not subject to termination under Section 203.

However, in other situations RIAA and its members have an interest in there being workable recordation procedures under Section 203 that do not prejudice the ultimate resolution of the important questions raised by the Office's previous notice of inquiry ("NOI") concerning Specified Grants. *See* 75 Fed. Reg. 15,390-91 (Mar. 29, 2010).

Discussion

The Office Has Properly Determined that Its Recordation of Purported Termination Notices Covering Specified Grants Should Not Affect Judicial Review of Such Notices

The NPRM indicates that the Office wishes to handle recordation of Specified Grants in a manner akin to the Office's "rule of doubt" for copyright registrations. *See* Compendium II of Copyright Office Practices § 108.07 (1984) ("The Copyright Office will register the claim even though there is a reasonable doubt about the ultimate action which might be taken under the same circumstances by an appropriate court with respect to whether . . . legal and formal requirements of the statute have been met."). That is, the Office will accept for recordation a purported notice of termination identifying an execution date on or after January 1, 1978 even if it indicates a date of signing before 1978, but the Office does not intend that action to "prejudice . . . how a court might ultimately rule." 75 Fed. Reg. at 72,772; *see also id.* at 72,771 ("Whether such notices fall within the scope of section 203 will ultimately be a matter to be resolved by the courts."). Such an approach seems reasonable under the circumstances.

This approach is consistent with the Office's longstanding position that when there are disputed questions concerning the propriety of purported terminations, its recordation practices should not affect judicial determination of those questions. Thus, for example, when the Office first adopted regulations for recordation of termination notices, it expressly declined to take a position concerning the timeliness of Section 304(c) termination notices served or recorded before 1978. 42 Fed. Reg. 45,916, 45,917 (Sept. 13, 1977). Instead, it included in its regulations

the predecessor of current 37 C.F.R. § 201.10(f)(5), which provides that recordation by the Office of a purported notice of termination "is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met." The Office explained that this provision –

> reflects a point made in several comments: That the act of the Copyright Office in recording a copy of a notice of termination does not accord that notice any presumption of validity. Although this point is rather clear from the statute itself, sufficient concern was expressed to justify stating it expressly in the regulation.

Id. at 45,920.

An approach akin to the "rule of doubt" is probably the only appropriate course at this point. The comments submitted in response to the NOI raised complicated issues of law and policy that have significant economic consequences for different groups of authors and for the recipients of grants made by authors. The NPRM briefly summarized the comments but did not attempt to resolve those issues based on a reasoned interpretation of the relevant statutory provisions. Under these circumstances, the Office's desire to avoid affecting judicial determination of the propriety of termination of Specified Grants is entirely proper.

The Proposed Rule Should Be Modified to Avoid any Doubt Concerning the Office's Proper Conclusion that Its Recordation of Purported Termination Notices Covering Specified Grants Should Not Affect Judicial Review of Such Notices

While the NPRM is reasonably clear that courts should not give deference to the Office's decision to accept for recordation notices purporting to terminate Specified Grants, RIAA is concerned that the text of the proposed rule, once codified, might be misinterpreted.

The proposed rule would carry forward the basic structure of the current termination regulations. Thus, 37 C.F.R. § 201.10(f)(4) would continue to refer to a "judgment of the Copyright Office" concerning timeliness, and 37 C.F.R. § 201.10(f)(5), which would not be modified by the proposed rule, would continue to disclaim prejudice to any party challenging the

propriety of a termination. The proposed rule does not specifically address Specified Grants, but seems to consider questions concerning the application of Section 203 to such grants as matters going to the timeliness of the notice. Thus, the proposed rule does not specifically address an apparent change in Office practice: where the Office's practice previously appears to have been to refuse to record a notice it did not believe to be timely, the Office has now determined to record as notices of termination certain notices it has not concluded to be timely.

When the Office adopted the structure of its current regulations, including the reference to judgments concerning timeliness, the Office affirmed the "truism" that "the fact that the Office has accepted a document and recorded it as a notice of termination does not mean, necessarily, that the notice is sufficient to effect termination under the law." 74 Fed. Reg. 12,554, 12,555 (Mar. 25, 2009). The Office reiterated that "[r]ecordation . . . carries no legal presumption that termination has been properly effected." *Id.* However, the Office also stated that it "cannot accept a notice of termination that is untimely." *Id.* Applying the current regulatory structure to the changed practice announced in the NPRM might allow someone to argue that when the Office records a purported notice of termination of a Specified Grant, the Office has made a judgment that the notice is timely, and 37 C.F.R. § 201.10(f)(5) was not meant to preclude deference to such a judgment. In effect, the argument would be that the structure of the regulations distinguishes timeliness from other legal and formal requirements.

Such an argument should not prevail in view of the Office's longstanding position that its decisions concerning recordation of purported termination notices are not to receive deference, a position that is echoed in the NPRM. However, just as the Office went out of its way to dispel such arguments in its original termination regulations and again when it adopted the current regulatory framework, RIAA believes that dispelling such arguments in light of the changes

described in the NPRM warrants clearer treatment than simply preserving the basic structure of 37 C.F.R. § 201.10(f)(4) and (5). To make the Office's intentions in this regard clearer, RIAA suggests two changes to the proposed rule:

1. In the first sentence of 37 C.F.R. § 201.10(f)(4), insert the word "clearly" before the word "untimely", to be consistent with the Office's expressed desire to record purported termination notices as such when the Office views them as arguably timely.
2. In the second sentence of 37 C.F.R. § 201.10(f)(5), insert the words "timely or" before the phrase "otherwise sufficient", to be clear that the provisions of 37 C.F.R. § 201.10(f)(5) apply even as to matters of timeliness addressed in 37 C.F.R. § 201.10(f)(4).

We have set forth in Exhibit A a copy of the relevant provisions showing these proposed changes in context.

The Office has authority to make these changes in adopting a final rule. *See Am. Fed. of Labor and Congress of Indus. Orgs. v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) ("It is, of course, elementary that a final rule need not be identical to the original proposed rule. The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different – and improved – from the rules originally proposed by the agency." (internal quotation marks omitted)).

Conclusion

For the reasons set forth above, the Office has properly determined that it should not, through recordation of purported notices of termination, prejudice judicial determination of the application of Section 203 to Specified Grants (or the propriety of purported terminations

generally). To ensure that the proposed rule is not misconstrued, the Office should modify it as proposed above.

Dated: January 24, 2011

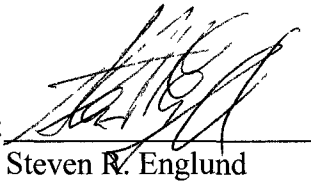
By: 

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Exhibit A
Proposed 37 C.F.R. § 201.10(f)(4) and (5) with RIAA's Proposed Modifications

§ 201.10 Notices of termination of transfers and licenses.

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(f) * * *

(4) Notwithstanding anything to the contrary in this section, the Copyright Office reserves the right to refuse recordation of a notice of termination as such if, in the judgment of the Copyright Office, such notice of termination is clearly untimely. Conditions under which a notice of termination will be considered untimely include: the date of execution stated therein does not fall on or after January 1, 1978, as required by section 203(a) of title 17, United States Code; the effective date of termination does not fall within the five-year period described in section 203(a)(3) of title 17, United States Code; or the documents submitted indicate that the notice of termination was served less than two or more than ten years before the effective date of termination. If a notice of termination is untimely or if a document is submitted for recordation as a notice of termination on or after the effective date of termination, the Office will offer to record the document as a "document pertaining to copyright" pursuant to § 201.4(c)(3), but the Office will not index the document as a notice of termination. Any dispute as to whether a document so recorded is sufficient in any instance to effect termination as a matter of law shall be determined by a court of competent jurisdiction.

(5) A copy of the notice of termination shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect. However, the fact that the Office has recorded the notice does not mean that it is timely or otherwise sufficient under the law. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met.