

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2010-5]

Gap in Termination Provisions

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Proposed Rulemaking; Request for Comments.

SUMMARY: The Copyright Office is proposing to amend its regulations governing notices of termination of certain grants of transfers and licenses of copyright under section 203 of the Copyright Act of 1976. The amendments are intended to clarify the recordation practices of the Copyright Office regarding the content of section 203 notices of termination and the timeliness of their service and recordation, including a clarification that the Office will accept for recordation under section 203 a notice of termination of a grant agreed to before January 1, 1978 as long as the work that is the subject of the grant was not created before 1978. Whether such notices of termination fall within the scope of section 203 will ultimately be a matter to be resolved by the courts.

DATES: Comments on the Notice of Proposed Rulemaking and Requests for Comments are due on or before [December 27, 2010.]

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office web site at www.copyright.gov/docs/termination. The web site interface requires submitters to

complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202-707-8125 for special instructions.

FOR FURTHER INFORMATION CONTACT: Amanda Wilson Denton, Counsel for Policy and International Affairs, by telephone at 202-707-8125 or by electronic mail at *amwi@loc.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Copyright Act gives authors (and some heirs, beneficiaries and representatives who are specified by statute) the right to terminate certain grants of transfers or licenses within the time frames set forth in the statute and subject to the execution of certain conditions precedent. Termination rights (also referred to as “recapture rights”) are equitable accommodations under the law. They allow authors or their heirs a second opportunity to share in the economic success of their works. Codified in sections 304(c), 304(d) and 203 of Title 17, respectively, they encompass grants made before as well as after January 1, 1978 (the effective date of the 1976 Copyright Act). However, the provisions do not apply to copyrights in works made for hire or

grants made by will. Sections 304(c) and 304(d) establish termination rights for works subject to grants of transfers or licenses of copyright (or of any right under a copyright) made before January 1, 1978, the effective date of the 1976 Copyright Act. Section 203, which is the subject of this proposed rulemaking, establishes termination rights for works subject to grants of transfers or licenses executed by the author on or after the effective date of the 1976 Copyright Act.

This proposed rulemaking is intended to address a narrow fact pattern that was the subject of a notice of inquiry after some authors and their representatives brought concerns to the attention of the Copyright Office and some Congressional Offices. In a Federal Register Notice dated March 29, 2010 (75 FR 15390), the Office sought comments as to whether or how the termination provisions apply in circumstances where a grant was agreed to prior to January 1, 1978, but the work in question was created on or after January 1, 1978. In response to the Notice of Inquiry, the Copyright Office received sixteen initial comments and nine reply comments. These comments are available online on the Copyright Office website, at <http://www.copyright.gov/docs/termination/>.

Several of those commenters took the position that the termination right provided in section 203 of the Copyright Act should be available under the circumstances in question. They based this position on a number of legal and policy arguments, prominent among which was the argument that a grant is not fully executed under the law until the relevant work has been created. Therefore, pre-1978 grants for works not created until January 1, 1978 or later should be subject to termination under section 203. *See, e.g.,* Comment of Jane C. Ginsburg, Columbia University Law School at page 1; and Comment of Kenneth D. Freundlich, Freundlich Law, and

Neil W. Netanel, UCLA Law School, at pages 5-6. This argument is closely related to the idea that the rights created by title 17 can vest only in actual works of authorship, making the creation date of the work central to the point in time at which any right under the Copyright Act, including the termination right, may be transferred. *See, e.g.*, Comment of Randall D. Wixen, Wixen Music Publishing, Inc., at 1. Several commenters also cited the legislative history of the 1976 Copyright Act and the express exceptions that are found within the termination provisions as evidence that Congress did not intend to preclude termination of pre-1978 grants of works created on or after January 1, 1978. *See, e.g.*, Comment of Bill Gable, Law Offices of Bill Gable, at page 2; and Comment of Niels Schaumann, William Mitchell College of Law, at page 4.

At least one comment, however, expressed skepticism that section 203 should apply to any fact patterns in which grants were made prior to January 1, 1978. It observed that there is some evidence that “Congress may have intended the term executed to mean signed” in other sections of the Copyright Act and that prior to the enactment of the Copyright Act of 1976, publications by the Copyright Office had expressed views consistent with the conclusion that a grant should be considered to be executed on the date the grant was signed. *See* Reply Comment of the Recording Industry Association of America, Inc. ("RIAA"), at pages 2-3.

Based on the comments received, the Copyright Office believes that there are legitimate grounds to assert that, in the case of a grant signed (or, in the case of an oral license, agreed to) before January 1, 1978 regarding rights in a work not created until January 1, 1978 or later, such a grant cannot be “executed” until the work exists. Therefore, the Office will record a notice of termination in such a case so long as the notice states that the grant was executed on a specified

date that is on or after January 1, 1978. A person serving and submitting a notice of termination based on the rationale described above would be justified in including in the notice, as the date of execution of the grant, the date that the work was created. For purposes of clearly identifying the grant being terminated, it may be useful also to state the date the grant was signed. The Office's recordation of such notices of termination is without prejudice as to how a court might ultimately rule on whether the document is a notice of termination within the scope of section 203. *See* 37 CFR 201.10(f)(5).

Through the proposed regulatory amendments, the Office seeks to provide immediate practical guidance in light of the fact that the first deadlines for serving notices of section 203 terminations for grants executed in 1978 (if the terminating party wishes to terminate on the earliest possible date) will begin to expire next year. The amendments clarify that, consistent with existing recordation practices, the Office reserves the right to refuse a document for recordation as a section 203 notice of termination if the date of execution of the grant, as reflected in the document submitted as a notice of termination, falls before January 1, 1978. This practice is consistent with the law (17 U.S.C. 203(a)) and the existing regulations (37 CFR 201.10(b)(2)). The proposed amendments to the regulations underscore the consequences of failure on the part of an author or his heirs to comply with this aspect of section 203(a) of the Copyright Act, which can prevent recordation of the document as a notice of termination. Failure to record a notice of termination in a timely manner is a fatal error that will prevent termination from taking effect.

The Office also takes the opportunity in this proposed rulemaking to clarify certain circumstances under which the Office will refuse to index as notices of termination documents

submitted under section 203, for reason of certain procedural failures drawn from the clear language of the Copyright Act. These circumstances include a date of execution of the grant that falls before January 1, 1978 (as discussed above), an effective date of termination that does not fall within the allowed statutory period (17 U.S.C. 203(a)(3)), improperly timed service of the notice of termination (17 U.S.C. 203(a)(4)(A)), or submission of documents for recordation as notice of termination on or after the effective date of termination (17 U.S.C. 203(a)(4)(A)). These circumstances are not intended to be an exhaustive list of procedural failures that may result in failure to record notices of termination.

List of Subjects in 37 CFR Part 201

Copyright.

Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend part 201 of 37 CFR, as follows:

PART 201 – GENERAL PROVISIONS

1. The authority citation for part 201 reads as follows:

Authority: 17 U.S.C. 702; Section 201.10 also issued under 17 U.S.C. 203 and 304.

2. Amend § 201.10 by revising paragraph (f)(4) as follows:

§ 201.10 Notices of termination of transfers and licenses.

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(f) *Recordation.*

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(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 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.

Dated: November 19, 2010

Marybeth Peters,
Register of Copyrights.

[BILLING CODE: 1410-30-P]