August 5, 2020

Hon. Maria Strong
Acting Register of Copyrights and
Director of the U.S. Copyright Office

Regan A. Smith
General Counsel and
Associate Register of Copyrights

Re: Joint Comments of The Authors Guild, American Photographic Artists, Songwriters Guild of America, Inc., Society of Composers & Lyricists, National Press Photographers Association, Professional Photographers of America, American Society of Media Photographers, Inc., The American Society for Collective Rights Licensing, The North American Nature Photography Association, and Graphic Artists Guild, Inc. on Modernizing Recordation of Notices of Termination (Docket No. 2020-10)

Dear Acting Register Strong and Associate Register Smith:

As representatives of American authors, illustrators, graphic artists, songwriters, photographers, lyricists, and composers, we are pleased to comment on the efforts by the US Copyright Office to sustain fairness and efficiency in the rules governing the exercise of termination rights, including the specific rulemaking changes discussed in this letter.

As the Copyright Office is well aware, the hard-won right to terminate grants of copyright ownership, control and use after a set number of years, with certain exceptions and limitations, were included in the U.S. Copyright Act of 1976 over the energetic objections of third-party assignees. Congress acted in this regard as a result of its recognition of the inherent fairness and necessity of such provisions in support of the advancement of the American creative community and national culture, as envisioned under Article I, Section 8 of the U.S. Constitution.

The plain fact underlying that visionary decision in 1976 by members of Congress is that the accurate valuation of new works in virtually every artistic discipline is by definition an impossible task. Under such circumstances, the only way to ensure that creators are fairly compensated for creating works of enormous popularity and value is to legally empower them to recapture copyright ownership or rights at some reasonable point after the grant. This new and unique copyright termination rights regime, which commenced in 1978, has proven to be far more effective in protecting the abilities of authors and their heirs to survive in the always-difficult economic environment of the arts than the system of bifurcated copyright terms accomplished under the 1909 Copyright Act.

At the same time, Congress also came to recognize that many of the copyright formalities included in the 1909 Act had served mainly as sources of unfair and often draconian punishments against authors who, lacking in technical expertise and financial ability to comply with such rules, often lost rights, protections, and sometimes entire works as a result of such failures. The accidental falling into the public domain of such great American works as the film *It's A Wonderful Life* and the song Rock Robin are just two examples among many such miscarriages of justice under the old U.S. Copyright Act.

Thus, Congress also adopted in the 1976 Act the general principle set forth in Article 5 (2) of the Berne Convention for the Protection of Literary and Artistic Works, to which the United States later became a signatory, that copyright protections should not be conditioned on the satisfaction by creators of statutory formalities:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.[1]

For these reasons and others set forth herein, we welcome the Office's proposed changes to the rules governing recordation of termination notices.

I. Statements of Interest

The Authors Guild is the oldest and largest professional writers' organization in the United States. The Guild's approximately 10,000 members include historians, biographers, academics, journalists, and other writers of nonfiction and fiction. Since its founding in 1912, the Guild has worked to promote the rights and professional interests of authors in areas including copyright, freedom of expression, and publishing contracts. The Guild regularly assists its members in preparing and serving notices of termination so they can make new and innovative uses of their works.

American Photographic Artists (APA) is a leading non-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

Songwriters Guild of America, Inc. (SGA) is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Established in 1931, SGA has for 89 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world. SGA's organizational membership stands at approximately 4500 members, and through its affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA and The Society of Composers & Lyricists (SCL) are part of a global coalition of music creators and heirs numbering in the millions.

The Society of Composers & Lyricists (SCL), with more than 1700 members, is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre), and a founding co-member of MCNA along with SGA.

National Press Photographers Association (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the "Voice of Visual Journalists," vigorously promoting the constitutional and intellectual

[1] Berne Convention for the Protection of Literary and Artistic Works, art. 5(2) (Sept. 9, 1886; revised July 24, 1971).

property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

Professional Photographers of America (PPA), the world's largest photographic trade association, represents photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years, and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected. Professional Photographers of America is joined in its support by its allied associations under the Alliance of Visual Artists umbrella; Society of Sport & Event Photographers (SEP), Commercial Photographers International (CPI), Evidence Photographers International Council (EPIC), Stock Artists Alliance (SAA) and Student Photographic Society (SPS). Professional Photographers of America, a 501(c)6 professional association organized in the state of Delaware, maintains its principle offices in Atlanta, Georgia.

American Society of Media Photographers, Inc. (ASMP) is a 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. In its seventy-five-year history, ASMP has been committed to protecting the rights of photographers, enhancing and strengthening copyright protections for visual creators, and promoting the craft of photography.

The American Society for Collective Rights Licensing (ASCRL) is a 501(c)(6) not-for-profit corporation founded in the United States to collect and distribute collective rights revenue for photography and illustration to United States authors and rights holders and to foreign national authors and rights holders whose works are published in the United States. ASCRL, represents over 16,000 illustrators and photographers, and is the leading collective rights organization in the United States for this constituency of rights owners. ASCRL is a zealous defender of the primary rights of illustrators and photographers, and ASCRL actively engages in policy and legislative initiatives that advance their interests.

The North American Nature Photography Association (NANPA) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography (both stills and video) as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

Graphic Artists Guild, Inc. (GAG) has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and producers for over 50 years. The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines provides graphic artists and their clients guidance on best practices and pricing standards.

II. Comments

Discretion in Recording Untimely Notices

We strongly support the Office's proposed amendment to restore its discretion to record untimely notices "if equitable circumstances warrant."[2] As the Office notes in its 2010 analysis of

[2] Modernizing Recordation of Notices of Termination, 85 Fed. Reg. 34150, 34151 (proposed June 30, 2020) (to be codified at 37 C.F.R. pt. 201).

gap grants, "[t]ermination rights…have an equitable function; they exist to allow authors or their heirs a second opportunity to share in the economic success of their works."[3]

Considering that refusal to record a notice of termination can extinguish the right of termination, the Office's discretion in making equitable judgments to the extent allowed by the statutes is vitally important. The Office, for its part, has diligently served as an equitable arbiter to ensure that ambiguities in the termination statutes are resolved in favor of the termination provision's intended beneficiaries—authors.[4] At the start of the decade, the Office undertook a comprehensive analysis of "gap grants" to understand the consequences for grantors who sign a contract years in advance of the work's creation, something that is common in many creative industries. In its report, the Office recognized that:

> [T]he act of recordation by the Office and the refusal of recordation by the Office do not carry equal weight under the law. The latter may permanently invalidate a notice of termination that is otherwise legally sound. This fact and Office's obligation to provide clear guidance in its practices and the regulations compel the Office *to record* [emphasis added] rather than reject notices of termination filed under section 203.[5]

The Office notes in the present notice that the change in wording—from "the Copyright Office *reserves the right to refuse* recordation of a notice of termination if….such notice of termination is untimely" to "the Copyright Office *will refuse* recordation of a notice of termination as such if…such notice of termination is untimely" [emphasis added]—occurred in 2017 as part of the parallel rulemaking on modernizing recordation practices without any discussion of reasons or "whether [the change] was intended to narrow the Office's discretion in this area."[6] Because this change did not issue from rulemaking specifically about limiting the Office's discretion, it's reasonable to assume that it does *not* compel the Office to reject untimely notices of termination without respect to equitable circumstances even if the apparent ambiguity created by replacing "reserves the right" to "will" opens one such interpretation. Nevertheless, the alteration that the Office is now proposing—replacing "will" to "may"—removes the ambiguity and realigns the wording with the Office's practice of recording notices with minor errors as long as the mistakes were made in good faith.

The lack of clarity with respect to when a grant under Section 203 is executed complicates the timing of termination notice service and recordation and will require a broader legislative fix. But until this fix is achieved, the Office should continue to have the flexibility to record notices of termination that may be untimely as a result of uncertainties about the date of execution yet deserve to be recorded to prevent harsh consequences.

Applying the Harmless Error Standard to Recordation Rules

[3] U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17 i (2010) (hereinafter Gap Grant Analysis).

[4] A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will 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).

[5] Gap Grant Analysis, *supra* note 3, at ii, fn. 1 (internal citations omitted).

[6] Modernizing Recordation of Notices of Termination, *supra* note 2, at 34151.

We also support the proposed amendments to § 201.10(e)(1)–(2) to make compliance with the Office's recordation rules subject to the harmless error standard. Currently, the Office applies the harmless error standard with respect to information contained in the notice to excuse good faith errors that do not affect the adequacy of notice to the grantee. As such, the harmless error standard adequately balances the equitable importance of the termination right for authors with the practical necessity of providing enough information to the grantee to make them aware that their rights in the work will expire on a certain date. A stricter compliance standard would burden the ability of grantors to reclaim their rights, while a looser standard excusing even errors that grossly misidentify the title or dates would defeat the purpose of the notice requirement. We think this is a sensible approach that should apply to all requirements pertaining to termination notices.

Manner of Service

a. Adding Email as an Acceptable Manner of Service

While we support adding email as an acceptable manner of service, we have concerns about requiring the remitter to first secure the grantee's "express consent" before serving the notice via email. It is unclear to us how a grantor would get "express consent" or what issues particular to email service such a requirement would solve.

Given the ubiquity of email communication today, it makes sense to update the regulation to allow service of notice terminations via email so long as no new, burdensome requirements are imposed. We are concerned that requiring "express consent" by the grantee puts a far greater burden on the grantor than is currently required for service to physical addresses. The current regulation requires only that the remitter of a notice self-certify under penalty of perjury that service was made to an address found to be the grantee or its successors' last known address after a reasonable investigation. The same standard could be used to determine the adequacy of service by email; the remitter who serves by email would self-certify that a notice had been served via email to an email address found after "reasonable investigation" to identify the most current address.

Adding email as an acceptable manner of service undoubtedly creates unique issues. For one, unlike physical addresses, which are finite, email addresses can be numerous, and selecting the most appropriate email address for service could be challenging for grantors. In such cases, the Office could offer further guidance as to selecting the most appropriate email alias to use as an elaboration of the "reasonable investigation" requirement. For example, serving a notice of termination by email to an alias dedicated to receiving legal notices would satisfy the requirement, but serving a notice by email to an "info" or "webmaster" address, or through the comments section of a website, would not.

In addition, there may be concerns about emails getting lost or filtered out as junk or spam. While these concerns are valid, they do not necessitate changing the standard by which the adequacy of service is judged, which only requires *sending* the notice (after reasonable investigation), not confirmation of delivery. A notice served by first-class mail to a physical address that is found after reasonable investigation to be the grantor's last known address, even if returned to the sender, satisfies the service requirements under the current regulation. There could be an added requirement or option to "open copy" the Register of Copyrights on the original email notice of termination at a specially designated email address at the Copyright Office as additional proof the notice of termination was sent to the terminated party.

These are just some initial examples of issues that may arise in adding email as an acceptable manner of service, and while we cannot endorse the "express consent" requirement proposed in the amendment to § 201.10(d), we would welcome an opportunity to discuss the unique contingencies of adding email as a method of service with the Office and other stakeholders.

b. Adding "Reputable Couriers" as an Acceptable Manner of Service

We support adding service by reputable couriers as an acceptable manner of service in § 201.10(d) in addition to first-class mail and personal service. We do want to caution the Office against adopting any rule that requires remitters to use tracking or delivery services as the costs of these services can be much higher than first-class mail.[7]

Identification of Work

We think that allowing remitters to identify the work by *either* title *or* registration number or both makes good sense, and we support the proposed changes to § 201.10 (b)(2)(iv). We agree with the Office that there is a greater risk of material errors being made by mistakes in the registration number that could affect the adequacy of a notice (such as a transposition error in the registration number that identifies another work), and that this risk should be noted in the Office's instructions for remitters. The Office might also consider issuing a circular specifically discussing common errors that can materially affect the adequacy of a notice, with examples of material and harmless errors.

Changes to Date of Recordation

We have one minor suggestion for the proposed amendment to § 201.10(f)(3), which sets the date of recordation to the date when the Office receives "a notice of termination" instead of the date when the Office receives "all elements required for recordation, including the prescribed fee…and statement of service": the Office should consider adding the words "a copy of" before "notice of termination." This will align the amended rule with the earlier mention of the requirement in § 201.10(f)(1)(i), which states that "a copy of the notice of termination" must be submitted for recordation, and other references to the termination notice in the regulation most of which mention "a copy of the notice of termination." This addition will also dispel any possible confusion among remitters as to whether they should submit the original notice.

Additional Subjects of Inquiry

a. Optional Form for Remitters

We strongly support the Copyright Office's creation of a form or template to assist remitters in creating and serving notices of termination to help ensure that all of the required regulatory and statutory elements are included. An online form that creators could fill out to generate a letter would be ideal. The creator could simply print out the termination notice letter for physical service (or serve it by email if and when the Office starts allowing service by email). The Office might even consider integrating the termination form into the Enterprise Copyright System (ECS) to harness the power of a centralized and interlinked database. For instance, the

[7] For example, first-class mail costs $.55 cents for a letter, while tracking services offered by the USPS start at $7.50

Office could consider programming automated alerts that would pop up if any information entered by the user in the termination form conflicts with information in the registration record (if one exists), thereby giving the notice-filer a chance to correct the erroneous information before service. The feasibility of additional functionalities, such as allowing users to serve the notice on authenticated grantees (for example, those grantees who have used the ECS to record the transfer and/or registered the work, and opted in for service in this manner), could be considered further down the line. In short, the integration of a fillable form into the ECS has a lot of potential to make the recordation of termination notices more efficient. The Office, however, should make it conspicuously clear at all times that using the form to generate and serve a notice does not guarantee recordation, and that ultimately the notice-filer is responsible for locating, entering, and verifying the accuracy of the information contained in the notice of termination.

b. Third-Party Agents

We have not encountered any instances of third-party agents improperly serving or filing notices, so we cannot directly attest to the importance of this issue. However, we are aware of concerns about negligent and fraudulent commercial services that have been voiced by other creators, and we would be in favor a notice of inquiry to gather more information about the scope of this issue. The Office might also consider an inquiry into the role of third-party agents in serving and filing notices of termination as an opportunity to look into a process whereby grantors may periodically designate and certify third-party agents using the ECS.

Once again, we thank the Copyright Office for the opportunity to submit these comments, and we are available for consultation.

Respectfully Submitted

Mary Rasenberger
Executive Director
The Authors Guild

Juliette Wolf-Robin
National Executive Director
American Photographic Artists

Rick Carnes
President, Songwriters Guild of America, Inc.
Officer, Music Creators North America

Ashley Irwin
President, Society of Composers & Lyricists
Co-Chair, Music Creators North America

David Trust
Chief Executive Officer
Professional Photographers of America

Akili-Casundria Ramsess
Executive Director
National Press Photographers Association

James Datri
Chief Executive Officer
American Society of Media Photographers

James Lorin Silverberg
CEO
American Society For Collective Rights Licensing

Susan Day
Executive Director
The North American Nature Photography Association

Lara Kisielewska
President
Graphic Artists Guild