

pertaining to a copyright” pursuant to § 201.4, but the Office will not index the document as a notice of termination.

(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.

(2) *Paper submission procedure*—(i) *Process*. A copy of a notice of termination may be submitted for recordation by sending it to the appropriate address in § 201.1(c) or to such other address as the Office may specify, accompanied by a cover sheet, the statement of service, and the proper fee.

(ii) *Cover sheet required*. Submission of a copy of a notice of termination must be accompanied by a completed Recordation Notice of Termination Cover Sheet (Form TCS), available on the Copyright Office Web site. Remitters must follow all instructions provided by the Office in completing Form TCS, including by providing all requested indexing information. Form TCS may be used to provide the statement of service and to make any of the certifications required by this paragraph (f). Form TCS will not be considered part of the recorded notice, but will be used by the Office for examination, indexing, and other administrative purposes. The Office may reject any notice submitted for recordation that includes an improperly prepared cover sheet.

(iii) *Return receipt*. If a remitter includes two copies of a properly completed Form TCS indicating that a return receipt is requested, as well as a self-addressed, postage-paid envelope, the remitter will receive a date-stamped return receipt attached to the extra copy acknowledging the Copyright Office’s receipt of the enclosed submission. The completed copies of Form TCS and the self-addressed, postage-paid envelope must be included in the same package as the submitted notice. A return receipt confirms the Office’s receipt of the submission as of the date indicated, but does not establish eligibility for, or the date of, recordation.

(iv) *Remitter certification*. The remitter must certify that he or she has appropriate authority to submit the notice for recordation and that all information submitted to the Office by the remitter is true, accurate, and complete to the best of the remitter’s knowledge.

(3) *Date of recordation*. The date of recordation is 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. After recordation, the notice, including any accompanying statement, is returned to the sender with a certificate of recordation.

(4) *Effect of recordation*. The fact that the Office has recorded a notice is not a determination by the Office of the notice’s validity or legal effect. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for effectuating termination (including the requirements pertaining to service and recordation of the notice of termination) have not been met, including before a court of competent jurisdiction.

(5) *Reliance on remitter-provided information*. The Copyright Office will rely on the certifications submitted with a notice and the information provided by the remitter on Form TCS and, if provided, in an accompanying statement of service. The Office will not necessarily confirm the accuracy of such certifications or information against the submitted notice.

\* \* \* \* \*

Dated: October 25, 2017.

**Karyn Temple Claggett**,  
*Acting Register of Copyrights and Director  
of the U.S. Copyright Office.*

**Carla D. Hayden**,  
*Librarian of Congress.*  
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## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 201

[Docket No. 2017-17]

#### Fees for Electronic Recordation and Notices of Intention To Obtain a Compulsory License

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Copyright Office is publishing a final rule establishing a separate, lower filing fee for recording documents when they are submitted with an electronic title list. Separately, the Office is noting a policy change, effective on the same date as the final rule, to require the payment of fees for the filing of *all* notices of intention to obtain a compulsory license to make and distribute phonorecords, including

those that are filed in the Office after failed delivery to the copyright owner.

**DATES:** Effective December 18, 2017.

**FOR FURTHER INFORMATION CONTACT:** Sarang V. Damle, General Counsel and Associate Register of Copyrights, by email at [sdam@loc.gov](mailto:sdam@loc.gov), or Jason E. Sloan, Attorney-Advisor, by email at [jslo@loc.gov](mailto:jslo@loc.gov). Each can be contacted by telephone by calling (202) 707-8350.

#### SUPPLEMENTARY INFORMATION:

#### I. New Recordation Fee for Electronic Title Lists

##### A. Background

This final rule adjusts U.S. Copyright Office fees in accordance with 17 U.S.C. 708. Section 708(a) specifies that “[f]ees shall be paid to the Register of Copyrights” for services, including a set of specified services enumerated in paragraphs (1) through (11) of that subsection.<sup>1</sup> This includes, as relevant here, fees for “the recordation, as provided by section 205, of a transfer of copyright ownership or other document.”<sup>2</sup> Fees for this service and the other services specifically enumerated in section 708(a)(1)–(9) are to be set forth in a proposed schedule that is sent to Congress 120 days before the adjusted fees can take effect.<sup>3</sup> The fee may go into effect after the end of that period unless “a law is enacted stating in substance that the Congress does not approve the schedule.”<sup>4</sup>

Before proposing new fees for the services enumerated in (1) through (9), the Register must conduct a study of the Office’s costs and must consider the timing of any fee adjustments and the Office’s authority to use the fees consistent with the Office’s budget.<sup>5</sup> Section 708(b) further provides that the Register may adjust these fees to “not more than that necessary to cover the reasonable costs incurred by the Copyright Office for . . . [such services], plus a reasonable inflation adjustment to account for any estimated increase in costs.”<sup>6</sup> Finally, section 708(b) also mandates that the “[f]ees [so] established . . . shall be fair and equitable and give due consideration to

<sup>1</sup> 17 U.S.C. 708(a).

<sup>2</sup> *Id.* at 708(a)(4).

<sup>3</sup> *Id.* at 708(b)(5).

<sup>4</sup> *Id.* Section 708(a) also authorizes the Register to fix fees for other services not enumerated in section 708(a)(1)–(9), such as the cost of preparing copies of Office records. *Id.* at 708(a). The fees for these additional Office services, as well as fees for the filing of cable and satellite statements of account under paragraphs (10) and (11) of section 708(a), need not be submitted to Congress, but are instead established by the Register of Copyrights by regulation based on the Office’s costs. *Id.*

<sup>5</sup> *Id.* at 708(b)(1).

<sup>6</sup> *Id.* at 708(b)(2).

the objectives of the copyright system.”<sup>7</sup>

### B. Cost Study

Pursuant to section 708, the Office submitted a proposed fee schedule and analysis to Congress on August 18, 2017.<sup>8</sup> That study and this final rule implementing the fee it proposed concern a single Copyright Office service: The recording of documents accompanied by electronic title lists, *i.e.*, lists of certain indexing information about the works to which such documents pertain.<sup>9</sup>

Since 1870, the Copyright Office has recorded documents pertaining to works under copyright, such as assignments, licenses, and grants of security interests. Under the Copyright Act, recordation of such documents is voluntary, but provides certain legal entitlements, such as constructive notice of the facts stated in the recorded document when certain conditions are met.<sup>10</sup> Thus, the Office has an important interest in ensuring that the public record of copyright transactions is as timely, complete, and accurate as possible.

In general, the recordation process is still paper based, and Office staff manually transcribe information from documents into an electronic format to permit indexing in the Office’s public catalog. Among the information that must be indexed are the titles of and related information for copyrighted works associated with the document submitted for recordation, which are typically presented in a list appended to the document, referred to informally as a “title appendix.” A title appendix associated with a document can include hundreds, or even thousands, of titles.

The manual entry of information from title appendices is a significant contributor to long processing times in the Office’s Recordation Section. In 2014, to gain efficiencies, the Office promulgated a new rule permitting documents submitted for recordation to be accompanied by an electronic title list in the form of an Excel

spreadsheet.<sup>11</sup> Document recordation fees, however, were last adjusted before the introduction of electronic title lists. Thus, the Office has never set a separate fee for recording documents with such lists, and currently charges the same recordation fee regardless of whether the document has an electronic title list.

As a result, the Office’s cost study proposed implementing a separate, reduced filing fee for groups of additional titles provided in an electronic title list that accompanies a document submitted for recordation. The fee adjustment implemented by this final rule only pertains to that fee. The Office is not adjusting the baseline document recordation fee of \$105 at this time; that fee will remain the same for recordations made both with and without electronic title lists. Nor is the Office adjusting the fee for groups of additional titles when an electronic title list is not used. Proposals for those fees will be included in a comprehensive study of all Copyright Office costs and fees expected to be submitted to Congress next year.

The fee-setting methodology employed by the study used activity-based costing principles which comply with standards set for federal managerial accounting<sup>12</sup> and with guidance for fee setting as published by the Office of Management and Budget Circular A–25 Revised: User Charges,<sup>13</sup> and the Government Accountability Office.<sup>14</sup> Under the approach, total costs for the entire recordation function were used to develop a time-based multiplier, which was then used to calculate the cost of the individual activities for recording the information contained in electronic title lists. The total cost of completing an electronic title list transaction was determined by aggregating the cost of each individual activity.

Cost studies of this type are typically retrospective, using actual data from a fiscal year that has concluded. This study used actual data from fiscal year 2016, but the methodology was applied prospectively against a planned new

service. This prospective approach was used because, concurrent with the effective date of this rule, the Office is implementing a new, more efficient process for providing this service than the one currently employed. This methodology was reviewed and validated by an independent consulting firm.

The new fee for documents submitted with electronic title lists to be implemented by this final rule is as follows:

1 to 50 additional titles: \$60  
51 to 500 additional titles: \$225  
501 to 1,000 additional titles: \$390  
1,001 to 10,000 additional titles: \$555  
10,001 or more additional titles: \$5,550

In the analysis submitted to Congress, the Office determined that while use of electronic title lists can significantly increase the Office’s processing efficiency, remitters had little incentive to use them. Thus, the Office proposed, and is now instituting, a fee for using electronic title lists that is generally lower than the current fee for recordations made without them. The lower fee is being adopted primarily to incentivize use of electronic title lists for documents with more than ten additional titles<sup>15</sup> in an effort to increase administrative efficiency and to offer a less expensive avenue to obtaining the benefits of recording a document with the Copyright Office.

In considering the fairness, equity, and objectives of the copyright system, the Office believes that offering recordation services for a lower fee, where remitters have done the work to create an electronic title list, should result in a wider range of remitters submitting documents and may also result in existing remitters submitting additional or updated documents with more frequency than they might otherwise. Receipt of additional recorded documents should result in greater copyright ownership data being incorporated into the Office’s records, which furthers the Office’s mission and benefits the public at large.

In its analysis, the Office also determined that as compared to manually indexing documents, where more titles generally means more processing time and higher costs, when an electronic title list is used, processing time is typically more constant. However, in further evaluating the fairness, equity, and objectives of the copyright system, the Office has

<sup>15</sup> Though documents with ten or fewer additional titles may be submitted with an electronic title list, the final rule will deliver fee savings to remitters where documents have more than ten additional titles.

<sup>7</sup> *Id.* at 708(b)(4).

<sup>8</sup> The study is available on the Office’s Web site at <https://www.copyright.gov/policy/feestudy2017/fee-study-2017.pdf>.

<sup>9</sup> Examples of such indexing information can include the types of works, the titles of the works (including alternate titles), their respective registration numbers, and authorship information.

<sup>10</sup> 17 U.S.C. 205(c) (“Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and (2) registration has been made for the work.”).

<sup>11</sup> See 79 FR 55633 (Sept. 17, 2014) (codified at 37 CFR 201.4(c)(4)).

<sup>12</sup> This includes the Federal Accounting Standards Advisory Board’s *Managerial Cost Accounting Concepts and Standards for the Federal Government*, which promotes activity-based costing for calculating the cost of providing services. See Fed. Accounting Standards Advisory Bd., Statement of Federal Financial Accounting Standards No. 4: *Managerial Cost Accounting Concepts and Standards for the Federal Government* (1995).

<sup>13</sup> See Office of Mgmt. and Budget, *Circular No. A–25 Revised: User Charges*, [Whitehouse.gov](http://www.whitehouse.gov/omb/circulars_a025), [http://www.whitehouse.gov/omb/circulars\\_a025](http://www.whitehouse.gov/omb/circulars_a025) (last visited Aug. 13, 2017).

<sup>14</sup> See U.S. Gov’t Accountability Office, *Federal User Fees: A Design Guide* (GAO–08–386SP) (2008).

decided to adopt a tiered pricing structure based on the number of titles to which the document pertains. Under this scheme, larger filers submitting documents with a larger number of titles pay a higher fee for the added benefit they receive (when the fee is viewed on a per-title basis) to offset the lower total fee for smaller filers with fewer titles. The first four tiers of the proposed schedule increase incrementally based on the total number of additional titles submitted. The reason for the larger jump between the fourth and fifth tiers is because of the significant added costs to the Office to process documents with 10,000 or more titles, caused by current system limitations.

The Office notes that the proposed fee schedule will be revisited as part of a comprehensive study of all Office costs and fees to be completed next year. As discussed above, the goal of the proposed fee schedule is primarily to incentivize use of electronic title lists. To do that, the proposed fee offers a discount from the ordinary recordation fee of \$35 per group of ten additional titles. When the full fee study examines all Office costs and evaluates an appropriate fee to record a document without an electronic title list in light of current costs, it is possible that fee will increase, in which case it is also possible that the fee being adopted for using an electronic title list may be adjusted upward as well to ensure adequate cost recovery.

### C. Effective Date

Congress's 120-day review period under 17 U.S.C. 708(b)(5) began after the Office submitted the proposed fee schedule and analysis on August 18, 2017. If no law is enacted stating in substance that Congress does not approve of the proposed recordation fee during such time, the fee will be instituted pursuant to this final rule, effective December 18, 2017.

## II. Notices of Intention

Though not related to the above-discussed cost study or final rule, the Office is taking this opportunity to provide public notice that it will implement a policy change regarding fees for notices of intention to obtain a compulsory license to make and distribute phonorecords ("NOIs").

Under the Copyright Act, section 115 establishes a compulsory license, whereby anyone may make and distribute phonorecords of nondramatic musical works, subject to certain terms and conditions, and upon paying royalties when applicable. To obtain a compulsory license, a licensee must serve an NOI on the relevant copyright

owner in the form and manner specified by Copyright Office regulations.<sup>16</sup>

In two circumstances, however, an NOI can be filed with the Copyright Office rather than the copyright owner. First, if the public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, the NOI can instead be filed with the Office.<sup>17</sup> These "unidentified NOIs" can be filed electronically or in paper hard copy, though a discounted fee is offered for electronic submissions.<sup>18</sup>

Second, if the NOI is sent to the last address for the copyright owner shown by the Office's records, but is returned to the sender because the copyright owner was no longer located at that address or refused to accept delivery, the Office's regulations permit the "original Notice as sent" to be filed with the Office, along with a "brief statement that the Notice was sent to the last address for the copyright owner shown by the records of the Copyright Office but was returned," and may also "be accompanied by appropriate evidence that it was mailed to, or that delivery by reputable courier service was attempted at, that address."<sup>19</sup> Typically, for these "returned-to-sender NOIs," the Office receives the NOI in the original mailing envelope marked with a return to sender label. The Office does not currently have any mechanism for accepting these NOIs electronically.<sup>20</sup>

The Office's regulations used to explicitly state that no filing fee would be charged for returned-to-sender NOIs, while such a fee *would* be charged for the unidentified NOIs.<sup>21</sup> But in 2001, the Office issued a notice of proposed rulemaking seeking to remove this limitation, as "[t]he cost to the Office of processing the filing of a Notice of Intention is the same whether the copyright owner is not identified in the records of the Office or the copyright owner is no longer located at the address shown in the records of the Office or has refused to accept delivery."<sup>22</sup> The Office believed that the

same filing fee "should be charged in both cases."<sup>23</sup> The final rule, effective in 2004, adopted that proposal, repealing the regulatory language that had expressly prohibited charging a fee.<sup>24</sup> Consistent with this rulemaking, the Copyright Office's fee schedule does not distinguish between different types of NOIs.<sup>25</sup>

In practice, however, and in part due to the extremely low volume of returned-to-sender NOIs the Office received in the years following adoption of the 2004 rule, the Office abstained from imposing the established fee. In recent years, however, the volume of returned-to-sender NOIs has increased sharply. Last year the Office received over 800 such NOIs, and this year the Office has received over 2,000 to date. Each of these NOIs must be individually and manually processed. Because of this increased burden, the Office can no longer afford to forbear from the collection of fees. Accordingly, this document announces a policy change that will be implemented on December 18, 2017: Any returned-to-sender NOIs received in the Office on or after that date *must* be accompanied by the same filing fee applicable to other paper-filed NOIs, which is currently \$75 plus \$20 per group of one to ten additional titles.<sup>26</sup> The Office is publicly announcing this policy change in advance to give remitters of returned-to-sender NOIs time to adjust their practices.

### List of Subjects in 37 CFR Part 201

Copyright, General provisions.

### Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

## PART 201—GENERAL PROVISIONS

- 1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

- 2. Amend § 201.3 by revising paragraph (c)(16) to read as follows:

**§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.**

\* \* \* \* \*

(c) \* \* \*

regard to the licensee's reason for filing the Notice with the Office").

<sup>23</sup> 66 FR at 45243; *see also* 69 FR at 11572.

<sup>24</sup> 69 FR 34578, 34583 (June 22, 2004).

<sup>25</sup> *See* 37 CFR 201.3(e)(1) (establishing a fee for "[r]ecordation of a notice of intention to make and distribute phonorecords" without differentiation).

<sup>26</sup> *See id.*

<sup>16</sup> *See generally* 37 CFR 201.18.

<sup>17</sup> 17 U.S.C. 115(b)(1).

<sup>18</sup> 37 CFR 201.3(e)(1).

<sup>19</sup> *Id.* § 201.18(f)(2).

<sup>20</sup> *See id.*

<sup>21</sup> Compare 37 CFR 201.18(e)(1) (2003) ("Notices of Intention submitted for filing shall be accompanied by the fee specified in § 201.3(e).") with *id.* § 201.18(e)(3) ("No filing fee will be required in the case of Notices filed under this paragraph.").

<sup>22</sup> 66 FR 45241, 45243 (Aug. 28, 2001); *see also* 69 FR 11566, 11572 (Mar. 11, 2004) (additional, related notice of proposed rulemaking reiterating that "the Office intends to amend its rules to require a filing fee in each instance where the Notice is filed with the Copyright Office without

Registration, recordation and related services	Fees (\$)
(16) Recordation of a document, including a notice of intention to enforce	
Single title .....	105
Additional titles (per group of 1 to 10 titles) .....	35
Additional titles provided in an electronic title list	
1 to 50 additional titles .....	60
51 to 500 additional titles .....	225
501 to 1,000 additional titles .....	390
1,001 to 10,000 additional titles .....	555
10,001 or more additional titles .....	5,550
Correction of online Public Catalog data due to erroneous electronic title submission (per title) .....	7

\* \* \* \* \*

Dated: October 24, 2017.

**Karyn Temple Claggett,**  
Acting Register of Copyrights and Director  
of the U.S. Copyright Office.

Approved by:

**Carla D. Hayden,**  
Librarian of Congress.

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**LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Part 202**

[Docket No. 2017-8]

**Secure Tests**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The U.S. Copyright Office is issuing an update to its interim rule, issued June 12, 2017, governing registration of secure tests. Based on the initial comments received on that interim rule, the Office has determined that there is an immediate need to establish a new group registration option for secure test questions and answers and other related materials (referred to as “test items”) that are stored in an electronic database, test bank, or other medium of expression. This interim rule incorporates most of the same procedures that the Office adopted in its recent interim rule on secure tests and adds additional procedures for group registration. To seek a group registration, applicants will be required to submit an online application, upload a redacted copy of the individual test items to the electronic registration system, and complete and submit a brief

questionnaire. If, based on the answers to the questionnaire, the test items appear to be eligible for the group registration option, the Office will contact the applicant and schedule an appointment to deliver these materials to the Office in person. On the appointed date, the applicant must bring a copy of the application and a complete unredacted copy of the actual test items. In addition, the applicant must bring a redacted copy of the test items, and a signed declaration confirming that this copy is identical to the redacted copy that was uploaded to the electronic registration system. The Office will examine each test item to determine if it contains sufficient copyrightable authorship. If the Office registers the claim, the registration will cover each test item as a separate work of authorship, and the registration will be effective as of the date the Office initially received the application, filing fee, and the redacted copy of the test items in proper form through the electronic registration system. To be clear, the previous interim rule otherwise remains in effect, and applicants may continue to use that rule to register individual secure tests. The Office welcomes public comment on both this interim rule and the June 12, 2017 interim rule.

**DATES:** Effective November 13, 2017. Comments on this interim rule and the interim rule published on June 12, 2017 (82 FR 26850), must be made in writing and must be received by the U.S. Copyright Office no later than December 11, 2017.

**ADDRESSES:** For reasons of government efficiency, the U.S. Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are on the U.S. Copyright

Office Web site at <http://copyright.gov/rulemaking/securetests/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office for special instructions using the contact information below.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice; Sarang Vijay Damle, General Counsel and Associate Register of Copyrights; Erik Bertin, Deputy Director of Registration Policy and Practice; or Abioye Ella Mosheim, Attorney-Advisor, by telephone at 202-707-8040 or by email at [rkas@loc.gov](mailto:rkas@loc.gov), [sdam@loc.gov](mailto:sdam@loc.gov), [ebertin@loc.gov](mailto:ebertin@loc.gov), and [abmo@loc.gov](mailto:abmo@loc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. General Provisions Regarding Copyright Registration*

Under the Copyright Act of 1976, the U.S. Copyright Office (the “Copyright Office” or “Office”) is responsible for registering copyright claims. See 17 U.S.C. 408. In doing so, the Office has a statutory obligation to confirm that the legal and formal requirements for registration have been met, such as confirming fixation and examining the work for copyrightable authorship. See 17 U.S.C. 410(a) (obligating the Register of Copyrights (the “Register”) “after examination” to “determine[] that . . . the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met”).

The Office has the further obligation to obtain a registration deposit that is sufficient to verify the scope of the claim, and to provide an adequate archival record of what was examined and registered. *Id.* 408(b) (generally requiring a “complete” copy of works deposited for registration); *id.* 705(a) (requiring the Register to “ensure that