



# ANNOUNCEMENT

from the Copyright Office, Library of Congress,  
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

## FINAL RULE

### NOTICE OF TERMINATION

The following excerpt is taken from Volume 67, Number 221 of the *Federal Register* of Friday, November 15, 2002 [Rules and Regulations] (pp. 69134-69137)

#### LIBRARY OF CONGRESS

Copyright Office  
37 CFR Part 201  
[Docket No. RM 2001-2A]

#### Notice of Termination

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

**ACTION:** Final rule.

**SUMMARY:** The Copyright Office is publishing a final rule amending its regulation governing notices of termination of transfers and licenses covering the extended renewal term. The current regulation is limited to notices of termination made under section 304(c) of the copyright law. The Sonny Bono Copyright Term Extension Act created a separate termination right under section 304(d). The final rule establishes procedures governing notices of termination of the extended renewal term under either section 304(c) or section 304(d).

**EFFECTIVE DATE:** January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Kent Dunlap, Principal Legal Advisor for the General Counsel. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

#### SUPPLEMENTARY INFORMATION:

##### 1. Background

Under the 1909 copyright law, works copyrighted in the United States before January 1, 1978, were subject to a renewal system in which the term of copyright was divided into two consecutive terms. Under the system initially established by the 1909 legislation, the duration of copyright protection was for an original copyright term of 28 years and a renewal term of an additional 28 years. The Copyright Act of 1976, Public Law 94-554, retained the renewal system for works that were copyrighted before 1978, and were still in their first term on January 1, 1978. However, under section 304 of the copyright law,

the renewal term was extended to 47 years, creating a total potential duration period of 75 years.

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Besides generally extending the renewal term to 47 years, Congress also provided a termination procedure authorizing the termination of transfers or licenses during the extended portion of the renewal term. Established under section 304(c) of the copyright law, this provision created a means for authors and heirs of authors to secure the benefits of the additional 19 years added to the renewal term. In 1977, the Copyright Office adopted a regulation establishing the procedures for exercising the termination right. 37 CFR 201.10.

On October 27, 1998, President Clinton signed into law the Sonny Bono Copyright Term Extension Act, ("CTEA"), Public Law 105-298, 112 Stat. 2827 (1998). The CTEA amended the copyright law, title 17 of the United States Code, to extend for an additional 20 years the term of copyright protection in the United States. For works for which the duration of protection was determined under section 304 of title 17, the renewal term was extended from 47 years to 67 years. Like the Copyright Act of 1976, CTEA also contained a termination provision covering the newly extended portion (in this case, the last twenty years) of the extended renewal term. Established under section 304(d), this new right of termination was available only if the termination right under section 304(c) had expired by the effective date of CTEA, and if no termination had been previously exercised under section 304(c).

##### 2. Proposed Regulation

On May 3, 2001, the Copyright Office published a proposed regulation modifying the termination regulation to include terminations made under section 304(d), in addition to terminations under section 304(c). 66 FR 22139. This was to be accomplished by making several adjustments to existing Copyright Office regulations.

Most of the changes involved 37 CFR 201.10, which governs notices of termination of transfers and licenses covering the extended renewal term. The proposed regulation added introductory text clarifying that the scope of the regulation covers terminations under either section 304(c) or section 304(d). In provisions where the existing regulation referred to section 304(c), the proposed regulation added an alternative reference to section 304(d).

The Office proposed substantive changes in only two areas. First, subsection (c)(i) of the proposed regulation provided that if the termination is made under section 304(d), the notice will provide a statement to that effect. Most of the notices of termination made under 304(d) which have been received in this Office already contained such a statement. No corresponding requirement was imposed in notices of termination issued under section 304(c) because such a requirement would have upset established legal practices in issuing notices under that section.

The second substantive change in the proposed regulation created new subsection (c)(vi), requiring that notices under section 304(d) contain a statement that termination of rights for the extended renewal term had not been previously exercised. This is a statutory requirement imposed in subsection 304(d), and including the requirement as part of the notice made it less likely that second notices of terminations would be filed.

The proposal further included a provision modifying 37 CFR 201.4(a)(v), regarding recordation of transfers and certain other documents, to include a reference to section 304(d).

##### 3. Comments and Modifications

The Copyright Office received one comment on the proposed modification of the regulations. Professor Tyler Ochoa of Whitter Law School suggested two modifications in the content of the termination notice to make it consistent with the statute. First, he noted that since terminations cannot be made for works made for hire, notices of termination

for both section 304(c) and (d) should affirmatively state that the work is not a work made for hire. Second, he pointed out that in order to be eligible to terminate under section 304(d), the termination right under section 304(c) must have expired by the effective date of the Sonny Bono Copyright Term Extension Act. Since CTEA took effect on October 27, 1998, Professor Ochoa calculated that termination under section 304(d) would only be available for works first published between January 1, 1923, and October 27, 1939. Accordingly, he asserted that notices of termination under section 304(d) should affirmatively assert that the work was originally published between these dates.

The Copyright Office has considered Professor Ochoa's comments carefully. The requirement in section 304(d) that the termination right under section 304(c) must have expired at the time CTEA took effect was a provision reflected in the proposed regulation. We agree in principle with Professor Ochoa's comments on this point. However, we disagree with some of the details of his analysis. First, he states that the relevant dates are January 1, 1923, and October 27, 1939. In fact, although Professor Ochoa is correct in calculating that January 1, 1923, (the copyright date of the earliest works the terms of which were extended by CTEA) is the first of the two relevant dates, he appears to be a day late in his calculation of the second date. The better reading of section 304(d) is that copyright must have been secured no later than October 26, 1939. That is the last date on which copyright could have been secured for any work for which the section 304(c) termination right had already expired by October 27, 1998, the effective date of CTEA.

We calculate this date by noting that termination of a transfer or license under section 304(c) may be effected during a period of five years commencing "fifty-six years from the date copyright was originally secured," 17 U.S.C. 304(c)(3), meaning that termination may be effected up to 61 years (56 + 5) after copyright was secured. However, in order to effect a termination, an author or an author's successor must serve a notice of termination "not less than two years before" the effective date, *i.e.*, up to 59 years (61 - 2) after copyright was secured. 17 U.S.C. 304(c)(4) (a). Therefore, the termination right will have "expired," *see* 17 U.S.C. 304(d), 59 years after copyright was secured. *See* S. Rep. No. 104-315, at 22 (1996) (purpose of section 304(d) was to "provide a revived power of termination for individual authors whose right to terminate prior transfers and licenses of copyright under section 304(c) has expired, provided the author has not previously exercised that right"). On the effective date of CTEA, October 27, 1998, an author of a work for which copyright had first been secured on October 27, 1939, could still have served an effective notice of termination under section 304(c). Therefore, there would have been no need to give that author the additional right

to serve a notice of termination under section 304(d). But an author of a work for which copyright had first been secured on October 26, 1939, could not have served an effective notice of termination on October 27, 1998, because the 59-year deadline for serving a notice of termination would have expired at the end of the previous day, *i.e.*, on October 26, 1998. Hence, works for which copyright was secured between January 1, 1923, and October 26, 1939, (and for which the section 304(c) termination right was not exercised) are eligible for the section 304(d) termination right.

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Second, Professor Ochoa states that the requirement is that the work was first published between the relevant dates in 1923 and 1939. In fact the requirement is somewhat broader: copyright must have been secured on or between those dates. *See* 17 U.S.C. 304(d) (2). Although publication with notice was the most common means of securing copyright under the Copyright Act of 1909, copyright could also be secured for certain unpublished works by registering those works with the Copyright Office. *See* section 11 of the 1909 Act, 17 U.S.C. 12 (repealed effective Jan. 1, 1978).

Although we agree in principle with Professor Ochoa's observation, we note that the regulation already requires that the notice of termination designate the date on which copyright was originally secured. To add to this requirement an additional statement that the copyright was secured between January 1, 1923, and October 26, 1939, would be redundant. Nevertheless, it would be useful for parties involved in a termination under section 304(d) to be aware of this requirement. For this reason, we are adding the following sentence to the introductory paragraph of Sec. 201.10: "a termination under section 304(d) is possible only if no termination was made under section 304(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939."

With regard to the proposal to add a statement in the notice of termination that the work was not a work made for hire, the Copyright Office has decided not to adopt this suggestion. The regulation on notice of termination has never required that a notice of termination recite all of the statutory requirements underlying termination. The current regulation has been in effect since 1977, and no practitioner has reported a problem because the notice does not affirmatively state that the work being terminated is not a work made for hire. For this reason, the Copyright Office has decided not to disrupt settled practice in this area.

In reviewing generally the proposed regulation, the Copyright Office has also decided to adopt a number of technical corrections. In the proposed regulation, a new subsection (b)(vi) required that notices under section 304(d) contain a statement "that termination

of rights for the extended renewal term has not been previously exercised." This provision was intended to apply to the 19-year extended renewal term under section 304(c), rather than the 20-year extended renewal term under section 304(d). In order to clarify this matter, the language has been revised to read: "If termination is made under section 304(d), a statement that termination of renewal term rights under section 304(c) has not been previously exercised."

In order to give authors and practitioners sufficient time to learn of these new requirements, the effective date of these amendments to the regulation is January 1, 2003. Notices of termination served on or after January 1, 2003, must comply with the amended regulation. Of course, authors and their representatives who serve notices of termination prior to that date are encouraged, although not required, to include the information that will be required in the amended regulation.

## List of Subjects in 37 CFR Part 201

Copyright.

### Final Regulation

In consideration of the foregoing, the Copyright Office is amending part 201 of 37 CFR, chapter II in the manner set forth below:

## PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 is revised to read as follows:

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

Section 201.10 also issued under 17 U.S.C. 304.

### Sec. 201.4 [Amended]

2. In Sec. 201.4(a)(1)(v), add "and (d)" after "304(c)."

### Sec. 201.10 [Amended]

3. Section 201.10 is amended as follows:
- by adding introductory text before paragraph (a);
  - by redesignating paragraphs (b)(1)(i) through (v) as (b)(1)(ii) through (v) and (vii), respectively;
  - by adding new paragraphs (b)(1)(i) and (vi);
  - by removing "paragraph (v)" in newly redesignated paragraph (b)(1)(vii) and adding "paragraph (vii)" in its place; and
  - by revising paragraphs (c)(2), (d)(2), (d)(4) and (e).

The revisions and additions to Sec. 201.10 read as follows:

### Sec. 201.10 Notices of terminations of transfers and licenses covering extended renewal term.

This section covers notices of termination of transfers and licenses covering the extended renewal term under sections 304(c) and 304(d) of title 17, of the United States Code.

A termination under section 304(d) is possible only if no termination was made under section 304(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939.”

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) If the termination is made under section 304(d), a statement to that effect;

\* \* \* \* \*

(vi) If termination is made under section 304(d), a statement that termination of renewal term rights under section 304(c) has not been previously exercised; and

\* \* \* \* \*

(c) \* \* \*

(2) In the case of a termination of a grant executed by one or more of the authors of the work, the notice as to any one author’s share shall be signed by that author or by his or her duly authorized agent. If that author is dead, the notice shall be signed by the number and proportion of the owners of that author’s termination interest required under section 304(c) or section 304(d), whichever applies, of title 17, U.S.C., or by their duly authorized agents, and shall contain a brief statement of their relationship or relationships to that author.

\* \* \* \* \*

(d) \* \* \*

(2) The service provision of either section 304(c) or section 304(d) of title 17, U.S.C., whichever applies, will be satisfied if, before the notice of termination is served, a reasonable investigation is made by the person or persons executing the notice as to the current ownership of the rights being terminated, and based on such investigation:

(i) If there is no reason to believe that such rights have been transferred by the grantee to a successor in title, the notice is served on the grantee; or

(ii) If there is reason to believe that such rights have been transferred by the grantee to a particular successor in title, the notice is served on such successor in title.

\* \* \* \* \*

(4) Compliance with the provisions of paragraphs (d)(2) and (3) of this section will satisfy the service requirements of either section 304(c) or section 304(d) of title 17, U.S.C., whichever applies. However, as long as the statutory requirements have been met, the failure to comply with the regulatory provisions of paragraph (d)(2) or (d)(3) of this section will not affect the validity of the service.

(e) *Harmless errors.* (1) Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of either section 304(c) or section 304(d) of title

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17, U.S.C., whichever applies, shall not render the notice invalid.

(2) Without prejudice to the general rule provided by paragraph (e)(1) of this section, errors made in giving the date or registration number referred to in paragraph (b)(1)(iii) of this section, or in complying with the provisions of paragraph (b)(1)(vii) of this section, or in describing the precise relationships under paragraph (c)(2) of this section, shall not affect the validity of the notice if the errors were made in good faith and without any intention to deceive, mislead, or conceal relevant information.

\* \* \* \* \*

Dated: October 28, 2002.

**Marybeth Peters,**  
*Register of Copyrights.*

**James H. Billington,**  
*The Librarian of Congress.*

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