

Practice Update

Adjustments to Copyright Act Timing Provisions for Applicants Affected by COVID-19

April 14, 2020

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which added § 710 to the Copyright Act. § 710 explains that if the Register of Copyrights determines that a declared national emergency “generally disrupts or suspends the ordinary functioning of the copyright system... or any component thereof,” then the Register may temporarily “toll, waive, adjust, or modify any timing provision... or procedural provision” in the Copyright Act. In exercising this authority, § 710 requires the Register to “consider the scope and severity of the particular national emergency, and its specific effect with respect to the particular provision” and to tailor any remedy accordingly.

On March 13, 2020, the President declared the COVID-19 outbreak in the United States to be a national emergency. The Acting Register of Copyrights has now determined that the COVID-19 national emergency has generally disrupted the ordinary functioning of the copyright system with respect to the ability of certain persons to timely comply with statutory or regulatory filing requirements, service requirement, or both. As a result, the Acting Register exercised the powers under § 710 of the CARES Act to adjust the applicable timing provisions in cases where the COVID-19 national emergency prevented compliance.

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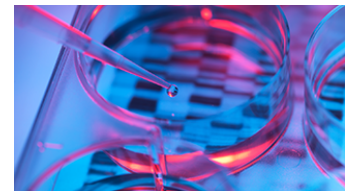
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Accordingly, on March 31, 2020, the Copyright Office (Office) announced adjustments to timing provisions related to certain registration claims and notices of termination for persons affected by the COVID-19 national emergency. Then, on April 6, 2020, the Office announced an adjustment to the timing provisions related to the paper-based provision of § 115 notices of intention (NOIs) and statements of account (SOAs) by entities impacted by COVID-19.

Unless modified by the Acting Register, these emergency modifications will expire on May 12, 2020 (*i.e.*, 60 days after the Presidential declaration of the COVID-19 national emergency).

1. Registration Timing Requirements for Certain Statutory Remedies

Under § 412 of the Copyright Act, a copyright owner is generally eligible to be awarded statutory damages in an infringement action when the work was registered prior to the infringement or registered within three months of the work's first publication. The effective date of registration is the date when the Office receives the application, deposit, and fee.

Because of the disruptions caused by the COVID-19 national emergency, the Office recognizes that some copyright owners of published works may be prevented from completing and submitting copyright applications in a timely manner. These disruptions include the lack of access to physical documents, including deposit copies of copyrighted works, or the inability to deliver materials to a mail carrier.

To mitigate the effect of these disruptions, the Acting Register temporarily adjusted the application of the timing provisions of § 412 to affected persons. The Office identifies three (3) distinct situations.

First, if the applicant can electronically submit the entire copyright application (*i.e.*, the submission

does not require a physical deposit), then the timing provisions are unchanged.

Second, if the applicant can electronically submit the copyright application, but is unable to submit the required physical deposit, then the applicant must upload the application with a declaration or similar statement certifying that the applicant is unable to submit the physical deposit, which applicant would have done but for the COVID-19 national emergency. The applicant must make the declaration or similar statement under penalty of perjury and must provide satisfactory evidence in support of the applicant's claim. The Office identified examples of satisfactory evidence as including, but not limited to, (i) a statement that the applicant is subject to a stay-at-home order issued by a state or local government, or (ii) a statement that the applicant is unable to access required physical materials due to closure of the business where they are located.

If the applicant can satisfy these requirements, and the three-month window for registration after the date of first publication was open as of March 13, 2020, then the Office will extend the window so long as the applicant submits the required deposit within 30 days after the date the COVID-19 disruption has ended. The Acting Register will identify the end of the COVID-19 disruption via a public announcement. These steps preserve the eligibility of the applicant to pursue remedies under § 412.

Third, if the applicant is unable to either electronically or physically submit an application during the COVID-19 disruption, then the applicant may submit an application after the Acting Register has announced the end of the COVID-19 disruption. With the application, the applicant must also include a declaration or similar statement certifying that the applicant was unable to either electronically or physically submit an application, which the applicant would have done but for the COVID-19 national emergency. The applicant must make the declaration or similar statement under penalty of

perjury and provide satisfactory evidence in support of the applicant's claim. The Office has identified examples of satisfactory evidence as including, but not limited to, (i) a statement that the applicant did not have access to a computer and/or the internet, or (ii) a statement that the applicant was prevented from accessing or sending required physical materials for reasons such as those noted above (*e.g.*, a stay-at-home order issued by a state or local government or closure of the business where they are located). These steps preserve the eligibility of the applicant to pursue remedies under § 412 by tolling the three-month window between March 13, 2020 and the date that the COVID-19 disruption has ended. For example, if the applicant first published a work on February 13, 2020, then the applicant would have two months following the end of the COVID-19 disruption to register the work to preserve his rights under § 412.

If the Acting Register finds satisfactory evidence that the COVID-19 national emergency affected the applicant, then the Copyright Office will annotate the registration record to reflect that determination.

2. Timing Requirements for Serving and Recording Notices of Termination

Under §§ 203 and 304(c) of the Copyright Act, an individual author may reclaim copyright interests previously transferred to another party in certain situations. Generally, an author may terminate a transfer within a five-year window, provided that the author serves notice on the transferee between two and ten years before the chosen termination date.

After service upon the transferee, the author must then record the notice with the Office.

The COVID-19 national emergency may negatively affect an author's ability to serve a notice of termination and then submit that notice for recordation. Because the statute requires an author to serve a notice of termination at least two years prior to the date of termination, the author's inability

to do so due to the COVID-19 disruption may have legal consequences. The Office recognizes that some authors may be able to choose a termination date that falls more than two years after the disruption has ended, or may have already anticipated a termination and served the appropriate notice. However, the Office also recognizes that for some authors that want to terminate a previous transfer, the end of the five-year termination window may occur in the spring of 2022, thereby necessitating the author's service of notice upon the transferee by the spring of 2020 (*i.e.*, during the COVID-19 national emergency). While some authors will be able to proceed in the normal course, the COVID-19 national emergency may prevent other authors from accessing the underlying agreements or other otherwise complying with these service requirements.

The Copyright Act also requires that an author record a termination notice served upon a transferee with the Office prior to the date of termination. The Office recognizes that the COVID-19 emergency may limit the ability of some authors to timely record a notice served upon a transferee with the Office.

To ensure that the COVID-19 national emergency does not prevent authors from effecting termination, the Acting Register has temporarily adjusted the timing requirements of §§ 203 and 304(c). The Office identifies two (2) distinct situations.

The first situation arises when the termination window is set to expire during the COVID-19 disruption. The Office will extend the 5-year window for terminating a transfer when:

- i. the author's five-year termination window expires on or after March 13, 2022 and less than two years after the date the COVID-19 disruption ends;
- ii. the author serves a notice of termination within 30 days after date the COVID-19

disruption has ended (as recognized by the Acting Register); and

iii. the author provides a declaration or similar statement certifying that the author would have served the notice at least two years prior to the close of the five-year window but for the COVID-19 national emergency. The author must make the declaration or similar statement under penalty of perjury and provide satisfactory evidence in support of the applicant's claim. The author must also provide this declaration or statement with the notice of termination to be recorded. The Office will subsequently annotate the public record to reflect this certification.

If an author meets these requirements, then the Office will consider the termination notice to be timely served under § 203(a)(4)(A) or § 304(c)(4)(A). The author must still choose a termination date at least two years after the date of service.

The second situation arises when the recordation window is set to expire during the COVID-19 disruption. The Office will waive the requirement that an author record a termination notice prior to the date of termination when:

- i. the author has already served the termination notice on the transferee;
- ii. the notice identifies the termination date as on or after March 14, 2020 but on or prior to the date that the COVID-19 disruption has ended;
- iii. within 30 days after the date the COVID-19 disruption has ended, the author records the termination notice; and
- iv. with the recordation submission, the author includes a declaration or similar statement certifying that the author would have recorded the notice in a timely manner but for the COVID-19 national emergency. The author must make

the declaration or similar statement under penalty of perjury and provide satisfactory evidence in support of the applicant's claim. The Office has identified an example of satisfactory evidence as being that the author was prevented from accessing or mailing the required physical materials.

When an author meets these requirements, the Office will treat the termination notice as timely recorded under § 203(a)(4)(A) or § 304(c)(4)(A). The Office will subsequently annotate the public record to reflect that determination.

3. Timing Requirements for Serving § 115 Notices of Intention (“NOIs”) and Statements of Account (“SOAs”)

Again, due to the multitude of disruptions caused by the COVID-19 national emergency, the Office recognizes that some entities, including at least one digital music provider (“DMP”) and its licensing administrator, may be prevented from serving NOIs and SOAs in a timely manner due to an inability to physically process paper notices and statements resulting from a shutdown of corporate offices.

However, in this instance, the Office also understands that processing of paper checks originates from a different location and remains unaffected.

To mitigate the disruptions caused by the COVID-19 national emergency on all stakeholders of the § 115 license, the Acting Register has temporarily adjusted the application of certain timing provisions.

The adjustments are as follows:

a. Notices of Intention:

The Office will toll the requirement that a NOI be served during the COVID-19 disruption when:

i. the affected entity has sent an alert to the copyright owner (directly or through respective administrators) that it is unable to serve the NOI by paper. At the same time, the affected entity must provide the copyright owner with the appropriate contact information and clear instructions that enable the copyright owner to temporarily opt-into electronic delivery during the COVID-19 disruption and on a website of the licensee or its licensing administrator. A licensing administrator may make the alert. The Office will consider the alert to be sufficient when the related certifications include a description explaining that an alert was attempted but unsuccessful due to lack of electronic contact information or a lack of ability to deliver an alert stemming from the COVID-19 disruption;

ii. within 30 days after the date the disruption has ended (as identified by the Acting Register), the affected entity serves the NOI along with a clear statement indicating the date or expected date of distribution; and

iii. the author complies with the articulated general conditions (discussed *infra*).

B. Statements of Account and Royalty Payments:

The Office will toll the requirement that a monthly or annual SOA be served or royalty payment during the COVID-19 disruption when:

i. the affected entity has sent an alert to the copyright owner (directly or through respective administrators) that it is unable to serve the SOA by paper. At the same time, the affected entity must provide the copyright owner with the appropriate contact information and clear instructions that enable the copyright owner to temporarily opt-into electronic delivery during COVID-19 disruption and on a website of the licensee or its licensing administrator. A licensing administrator may make the alert. The

Office will consider this alert to be sufficient when the related certifications includes a description explaining that an alert was attempted but unsuccessful due to lack of electronic contact information or a lack of ability to deliver an alert stemming from the COVID-19 disruption;

ii. within 30 days after the date the COVID-19 disruption has ended, the affected entity serves the SOA with a clear statement indicating the period (month and year) covered by the applicable statement;

iii. the author complies with the articulated general conditions (discussed *infra*); and

iv. the affected entity continues to make timely payment of royalties to payees, whether electronically or by paper check, unless the certification includes a statement and supporting evidence describing the inability to make the required royalty payments.

C. General Conditions

For the purpose of the foregoing adjustments, general conditions are defined as follows:

i. Certification: An affected entity making use of this COVID-19 related adjustment must include a declaration or similar statement on each applicable NOI or SOA certifying that the affected entity would have served the NOI or SOA or made the royalty payment within the statutorily prescribed time but for the COVID-19 national emergency. The affected entity must set forth satisfactory evidence in support of that declaration or statement. Satisfactory evidence includes, but is not limited to, a statement that the COVID-19 disruption prevented the licensee and, if applicable, its vendor from mailing the required physical materials or payment, that the affected entity alerted or attempted to alert the

copyright owner of the ability to opt into electronic delivery, and that the affected entity was unable to obtain consent from the copyright owner to receive materials or payment electronically.

ii. Limitation to Paper-Based Delivery: As of April 6, 2020, the adjustment applies only to NOIs and SOAs sent to persons or entities who had previously received them in paper format prior to the COVID-19 national emergency. An entity with a demonstrated need to extend this adjustment to electronic delivery methods should contact the Copyright Office.

iii. Contact Information: Affected entities making use of this adjustment must make contact information and customer service accessible for persons, including copyright owners, who wish to understand how this tolling may affect them, including to opt into a temporary offer of electronic delivery or determine whether their interests are included in the list of affected works and licenses described below. Although the Copyright Office typically does not link to third parties, the Office is now sharing the following contact information:

ClientServices@harryfox.com and www.harryfox.com/#/hfa-account/register. If an affected entity wants to be added to this list, then that entity should contact the Office at copyright.gov/help/ or by phone at (202) 707-3000.

iv. Temporary Offer of Electronic Delivery: Affected entities making use of this adjustment must promptly provide a method for copyright owners who were receiving paper NOIs or SOAs prior to the COVID-19 national emergency to opt in, on a temporary basis, to electronic delivery and, separately, to direct deposit of payments. Unless the copyright owner has agreed to continued electronic delivery, such deliveries and deposits must automatically revert to a paper

format within 30 days after the date the COVID-19 disruption ends.

v. List of Affected Works and Licenses: Affected entities making use of this adjustment must track how they use it and must maintain a record of licenses by copyright owner for which they have made use of the adjusted timing provisions. Affected entities must also keep a list of the affected musical works. Over time, the Office expects the list of licenses with respect to the number of copyright owners to remain the same, or decrease, as copyright owners opt-into electronic delivery, while the list of affected works may increase as new sound recordings continue to be released.

vi. Licensee-Vendor Royalty Delivery: As applicable, an affected DMP or other user must continue to deliver royalty payments to its chosen administrator so that the administrator may promptly make royalty payments.

vii. Due Diligence: Except for the adjustments provided under this emergency authority, the due diligence requirements of §115(d)(10) remain unaltered.

4. Individuals Experiencing Additional Issues Should Contact the Copyright Office

As the Office becomes aware of other COVID-19-related disruptions to the copyright system, the Office will consider additional appropriate modifications. If the COVID-19 national emergency has negatively affected an individual's ability to participate in the copyright system, then that individual should contact the Copyright Office at copyright.gov/help/ or by phone at (202) 707-3000.

During the COVID-19 national emergency, the Office will continue to provide important updates regarding the copyright system at copyright.gov/coronavirus/.

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