

Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re

Designation of Agent To Receive
Notification of Claimed Infringement:
Notice Of Proposed Rulemaking And
Request For Comments

Docket No. RM 2011-6

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the Notice of Proposed Rulemaking (NPRM) and request for comments published by the Copyright Office (the Office) in the Federal Register at 81 Fed. Reg. 33,153 (May 25, 2016), the Computer & Communications Industry Association (CCIA)¹ submits the following comments on the proposed amendment of the Office’s regulations pertaining to the designation of an agent under the Digital Millennium Copyright Act (DMCA).

I. Summary

CCIA supports the Office’s attempts to improve DMCA notice-and-takedown regulations, especially those that promote efficiency, expedite processes, and reduce costs. However, while the NPRM focuses primarily on lowering the fee for designating an agent under the DMCA, which in most circumstances would be a beneficial idea, the NPRM also suggests an unwise recurring formality for intermediaries relying on the Section 512 safe harbor.

In particular, footnote 18 of the NPRM states that the Office contemplates requiring electronic re-registration of all currently designed agents once the Office’s proposed digital

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

database is released. It also suggests that online services would be required to subsequently renew such designations every three years. CCIA argues here as it did in 2011 that such a rule would be inconsistent with Section 512, would have negative implications for continued investment in the Internet industry, and would be ultimately unnecessary.

II. The Office has no statutory authority to impose mandatory renewal procedures once Section 512's requirements are met.

The Office's proposed new compliance burdens are contrary to the text of Section 512, as well as stated Congressional intent. When the Office first suggested in its 2011 Notice of Proposed Rulemaking that registrations may expire in the future, CCIA stated in that docket that the Office possessed no statutory ability to "expire" existing registrations.² This is so because a Copyright Office regulation may not extend liability to an area where Congress, by statute, has explicitly refused to do so. Congress has changed nothing in Section 512 since 1998 to alter this. Nor does the statute permit the imposition of mandatory re-filing once Section 512's requirements have been initially met. As long as the contact information contained in a designation remains current, a service provider is in compliance with Section 512(c)(2)(A) & (B).³

Because the Office is without authority to withdraw the liability limitations that Congress has provided once a service provider has satisfied the requirements of Section 512(c)(2), regulations to the contrary could lead to unnecessary litigation based on flawed technicalities. If the Office were to imply to the public that an otherwise DMCA-compliant service provider that had previously complied with Section 512(c)(2) were no longer eligible for the safe harbor, it

² CCIA Comments, In the Matter of Designation of Agent to Receive Notification of Claimed Infringement, Docket No. RM 2011-6 (Nov. 2011), *available at* <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/CCIA.pdf>.

³ The service provider's obligation is to publish a designated agent on its website, and convey that information to the Office. The manner in which the Office implements Section 512(c)(2) is independent of the service provider's Section 512 compliance requirements.

might induce rights holders to file substantively deficient infringement actions on the basis that the service provider theoretically would not be in compliance with the DMCA. This result would be the opposite of what Congress intended in enacting the DMCA. Consistent with Congress's intent to foster cooperation between rights holders and service providers and to ensure efficient resolution of online infringements, the proper course would be to proceed with a takedown notice instead of filing a lawsuit.

III. The Office should not impose additional formalities and regulatory burdens on service providers, especially startups.

The Office should not impose unnecessary recurring formalities on online services seeking to comply with the DMCA. The Section 512 compliance process is already cumbersome, with over a dozen independent prerequisites. This process is especially burdensome for startups and small businesses with limited resources (including independent creators, such as authors who run their own blog with comments), and can even be burdensome for larger companies with more resources. While efforts to input contact information in the Copyright Office database at a low cost are laudable, it would be unsound and inconsistent with Section 512 to attempt to revoke the safe harbors and impose liability on services that do not re-submit information to the Office which is already in the Office's possession.

This is not a hypothetical concern, as failure to comply with Section 512's designated agent requirement has proven to be a trap for the unwary. Otherwise complying with the safe harbor and processing takedown requests, but neglecting to appropriately designate with the Office an agent for receipt of Section 512 notices, has in fact led to loss of safe harbor

protection.⁴ At the same time, there is no evidence that the submission of copyright takedowns is being inhibited by incomplete Copyright Office database information. Indeed, in those cases where intermediaries have lost safe harbor protection due to formalistic compliance failures, plaintiffs had nevertheless succeeded in submitting takedowns, presumably using information on the intermediary's website.

A renewal requirement every three years (assuming the Office had such authority) would only exacerbate these compliance problems. Even for established companies, not to mention young startups, a recurring renewal requirement would present additional burdens on top of existing requirements, all in contravention of Congress's goals. Indeed, Congress intended the DMCA's safe harbor protections to foster, not stymie, innovation. The NPRM's proposal to require regular renewals would increase the barriers that smaller service providers face to retaining safe harbor protection, and would impede this objective.

Notably, there is substantial economic research demonstrating the widespread use of the DMCA, and a corresponding impact of the safe harbors on encouraging investment and innovation.⁵ Given that imposing unnecessary formalities in order to qualify for the DMCA could inhibit this investment and innovation in new online communication platforms and services, the Office should reconsider any proposal to impose recurring compliance burdens on sites and services that otherwise uphold their statutory obligations under the DMCA.

⁴ See, e.g., *BWP Media USA, Inc. v. Hollywood Fan Sites LLC*, 115 F. Supp. 3d 397, 403 (S.D.N.Y. 2015) (defendant was not eligible for DMCA safe harbor, notwithstanding defendant having processed takedowns on multiple occasions from plaintiff, due to agent designation information not being available on Copyright Office website); *Perfect 10, Inc. v. Yandex N.V. et al.*, 2013 WL 1899851, at *8 (N.D. Cal. May 7, 2013) (same).

⁵ See, e.g., Matthew Le Merle et al., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (Booz & Co. 2011), <http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>; Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf.

IV. Administrative convenience does not justify the renewal requirement, when Section 512 already incentivizes services to maintain accurate records.

The proposed renewal requirement is particularly concerning because, as noted above, the failure to designate a DMCA agent has been interpreted to mean that a platform has no safe harbor whatsoever.⁶ The consequences of an inadvertent failure to timely renew registrations may include potentially ruinous statutory damages, and this would substantially affect the large number of services that currently rely on the DMCA's protections. The NPRM states that 23,300 agent designations have been filed, and a survey of the database reflects over 90,000 individual entries.⁷ Exposing these tens of thousands of companies to massive liability risks, merely for failure to re-submit information that the Office possesses, is a drastic response to a poorly documented problem.

The DMCA has a built-in mechanism for incentivizing companies to provide accurate information. As stated in the statute, failure to comply with the existing requirements results in the loss of service providers' safe harbor. No evidence provided by the proposed renewal requirement shows that the added burden on service providers is justified. The NPRM asserts that the proposal is necessary to maintain a database free of inactive entries, but provides no reason for how storing old information would be harmful to copyright holders or impede safe harbor protections. Furthermore, the Office itself concedes in the NPRM that the current registrations are generally accurate. Essentially, requiring registrants to re-file triennially imposes a considerable risk and administrative burden upon service providers, which may result from minor clerical or technical issues, while documenting no benefit to the public, other than

⁶ *BWP Media USA, Inc. v. Hollywood Fan Sites LLC*, *supra* note 4.

⁷ Several months ago, CCIA calculated that agents had been designated for more than 90,000 sites, by compiling data from the Office's Directory of OSP Designated Agents. *See* CCIA Comments, In re Section 512 Study: Notice and Request for Public Comment, Docket No. RM 2015-7, at 5 (Mar. 2016).

the administrative convenience of the Office.⁸ (Indeed, it is unclear why a defunct service's presence in the database would impose a burden on either the Office or database users. If the site no longer exists, no rights holder would ever have cause to seek out that service's designated agent.) Because there are no benefits arising from the renewal requirement that would outweigh the substantial negative consequences, the Office would be unwise to proceed with expiring records, even if doing so were within its statutory capacity.

VI. Conditioning the protections of the Copyright Act on formalities is disfavored and should not occur absent a countervailing public interest.

Copyright formalities were one justification for U.S. implementation of the Berne Convention, and formalities of all kinds have been criticized in recent decades, including by the Copyright Office, as a potential “trap for the unwary.”⁹ Former Register of Copyrights Barbara Ringer once commented on the copyright registration formality by observing, “My philosophy has always been to reward authors for what they do, not to punish them for what they don't do.”¹⁰ The move away from formalities during the 20th century resulted from the view that, as stated in a Senate Report, they are “[a] substantial burden and expense,” “[an] unclear and highly technical requirement,” and “[i]n a number of cases it is the cause of inadvertent and unjust loss” of statutory protection.¹¹ Copyright formalities have thus become disfavored, even if it means (as is the case with the lack of a copyright registration renewal requirement) there is a public burden resulting from the absence of accurate copyright records.

⁸ Eric Goldman, *WARNING: Copyright Office Resurrects Troubling Plan To Strip Websites Of 512 Safe Harbor*, May 25, 2016, <http://blog.ericgoldman.org/archives/2016/05/warning-copyright-office-resurrects-troubling-plan-to-strip-websites-of-512-safe-harbor.htm>.

⁹ Copyright Office, *Orphan Works Report* (2006), at 43, 105, <http://copyright.gov/orphan/orphan-report-full.pdf>; 70 Fed. Reg. 3740 (Jan. 26, 2005); Vincent A. Doyle, George D. Cary, Marjorie McCannon & Barbara Ringer, *Study No. 7, Notice of Copyright* (1957), at 38, <http://www.copyright.gov/history/studies/study7.pdf>.

¹⁰ Judith Nierman, *Barbara Ringer: 1925-1909*, Copyright Notices, Apr. 2009 (Special Edition), at 5, <http://www.copyright.gov/docs/barabara-ringer-special-edition-2009-04.pdf>.

¹¹ S. REP. NO. 94-473, at 117-18 (1975).

Here, circumstances are reversed, as the Office proposes to impose additional formalities despite the absence of any apparent public benefit. And, as noted above, examples exist of online services already being punished for formality non-compliance under the DMCA, even where it has been clear that non-compliance caused no harm. Yet the NPRM seeks to actually increase the formality burden while articulating no benefit other than “database sanitation” that would accrue as a result of imposing this recurring burden. In sum, just as traditional formalities could present a trap for the unwary author, recurring DMCA formalities would magnify existing risks for the unwary DMCA beneficiary.

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Respectfully submitted,

Matt Schruers
Vice President, Law & Policy
Ali Sternburg
Public Policy & Regulatory Counsel
Computer & Communications
Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070
mschruers@ccianet.org