Before the
Library of Congress
Copyright Office
Washington, D.C.

In the Matter of Designation of Agent to Receive Notification of Claimed Infringement	Docket No. RM 2011-6

COMMENTS OF
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the Notice of Proposed Rulemaking ("NOPR") and request for comments published in the Federal Register at 76 Fed. Reg. 59,953 (Sept. 28, 2011), the Computer and Communications Industry Association ("CCIA") submits the following comments with respect to the Copyright Office's proposal to update its interim regulations governing online service providers' designation of agents to receive notices of alleged infringement under the Digital Millennium Copyright Act (DMCA).

I. Summary

CCIA supports improvement of notice and takedown regulations. To this end, CCIA notes that several aspects of the proposed rulemaking have merit. An online system for electronically filing and amending designations, for example, would likely expedite the designation process and ease the data entry burden of the Office. Amending the Office's rules to permit joint designations by related service providers would also promote efficiency. Similarly, permitting designations to utilize post office boxes is appropriate given that private individuals who operate services may desire to respond to DMCA takedowns and claim safe harbor protection, but for the fact that doing so would require advertising a personal home address.

Other aspects of the proposed regulations (hereinafter "Proposed § 201.38") require additional consideration, however. The remainder of these comments question whether there is evidentiary and statutory basis for imposing new regulatory obligations on service providers, including requiring re-filing and re-validating designations, particularly information that has not changed. More generally, some of the new compliance burdens are contrary to the text of Section 512, and should be revisited.

II. There is insufficient support to justify some of the proposed new regulations.

Proposed § 201.38 should be based on evidence that the usage of the Copyright Office database (rather than service providers' own DMCA pages) is large enough to justify imposing the burden of recurring compliance filings upon individuals, industry, and startups nationwide. If the record cannot demonstrate that a significant share of takedown claims are informed by the Copyright Office's database, then there can be little basis for increasing compliance costs. This data will be particularly salient with reference to imposing *recurring* obligations that could cause unwary service providers to lose their safe harbor notwithstanding having complied with all material elements of the law.

In addition, the new regulations should be based upon perceived malfunctions that are material to *users* of the regulatory system. The Office cites the persistence of entries for DMCA agents for businesses that have ceased operations as evidence for the proposal to mandate re-filing and periodic validation of DMCA agent information. These outdated entries impose little cost on prospective rightsholders using the database, however, since few rightsholders will ever want to send takedown notices to a service provider that no longer exists. This scenario does not justify any substantial compliance costs on the industry, startups, or members of the public who would want to claim safe harbor protections.

The Office also cites the possibility that the new database would enable litigants to "ascertain whether a service provider was in compliance with the requirements of the statute at a particular point in time" as a justification for the proposed 'versioning' system. However, existing 37 C.F.R. § 201.38(d) already requires registrations of agents to be dated, such that Copyright Office records can already enable rightsholders to ascertain whether a service provider was in compliance on a particular data. This proposed feature therefore does not provide sufficient value to justify new regulatory obligations.

III. The regulations cannot retroactively revoke liability limitations that Congress, by statute, has granted to compliant service providers.

The Copyright Office is without statutory authority to revoke safe harbor protection granted by Congress to online service providers. The NOPR's statement in Proposed § 201.38(d) that "[o]ne year after the effective date of this regulation, the old directory will no longer be accessible through the Copyright Office's Web site and will no longer satisfy the requirements of section 512(c)(2)" may reasonably apply to ISPs who have not previously registered with the Office. The NOPR further states that validation or amendment of a designation is required within two years, or "the designation of the agent will expire and will be removed".

However, once Congress granted liability limitation protections to online services who met the requirements of existing 37 C.F.R. § 201.38 to "provid[e] to the Copyright Office, substantially" the contents prescribed by Section 512(c)(2), the Office is without authority to withdraw those protections once a service provider has cleared the statutory hurdle of Section 512(c)(2). A regulation may not extend liability to an area where Congress, by statute, explicitly refused to do so.

IV. The Office has no authority to "expire" designations made in compliance with the statute, or impose mandatory re-filing once Section 512's requirements are met.

Section 512 does not enable the Office to "expire" designations. As long as the contact information contained in a designation remains current, the service provider at issue is in compliance with Section 512(c)(2)(A) & (B). In fact, the presence or absence of a service's designated agent on the Copyright Office's website is, in itself, not relevant to the service qualifying for the safe harbor.

Through the NOPR, the Office "proposes to place the burden of supplying complete, up-to-date information on services providers." However, Congress has already assigned that burden. Section 512(c)(2) placed upon the Register the responsibility of "maintain[ing] a current registry of agents available to the public for inspection"; it only placed upon services the obligation to *provide* contact information to the Office (and independently make it available through its own site or service). Once accurate contact information has been provided, the requirements of Section 512(c)(2)(A) & (B) are satisfied, and the statute does not authorize regulations by which an otherwise compliant service provider could have its safe harbor protection nullified.

V. The Office should not impose unnecessary recurring formalities on online services seeking to comply with the DMCA.

The Office proposes that each entity that has filed a designation of agent "be required, either annually, every two years, or at some other regular interval, to validate the information set forth in its designation". Once a site or service has filed an initial designation in compliance with Section 512(c)(2), however, the statute provides no vehicle for a regulatory mandate requiring reaffirmation of the same information.

In general, active services are likely to correct outdated information, insofar as rightsholders can and have argued that a missing or inaccurate agent designation deprives a service provider of the DMCA safe harbor. For example, adult content provider Perfect 10 recently succeeded in persuading a court that online storage site Rapidshare could not qualify for the DMCA safe harbor for the period when it had failed to designate an agent to the Copyright Office, notwithstanding the fact that Perfect 10 had already successfully submitted DMCA takedowns to Rapidshare using the contact information on the Rapidshare website. *See Perfect 10 Inc. v. Rapidshare A.G.*, S.D. Cal. 09-2596, May 18, 2010; *see also Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1057-58 (C.D. Cal. 2002) (cited in Notice). Because online services that fail to maintain current information with the Copyright Office may expose themselves to an argument from rightsholders that they cannot claim safe harbor protections, there is already sufficient incentive to maintain accurate information.

While efforts to ensure that contact information in the Copyright Office database remains current are laudable, and a recurring email notice would not be out of step with the statute, it would be unsound and inconsistent with Section 512 to attempt to revoke the safe harbor and impose liability on services who do not resubmit contact information to the Office which the Office already has.

In the 2006 Orphan Works report, the Register cited "substantial evidence" gathered during the preparation for the 1976 Act which demonstrated that formalities, including renewal, when combined with "drastic penalties", "served as a 'trap for the unwary'" which substantially injured rightsholders. *See* Report on Orphan Works, at 6 (2006).

Yet Proposed § 201.38 is itself a formality which -- at least as described in the NOPR -- may also impose harsh penalties for failing to prepare redundant paperwork at the proper time. In a recent survey by Booz & Co. of over 200 venture capitalists and angel investors, over 80 percent stated that undermining DMCA safe harbors would be worse for new investment in online services than recessionary economic conditions. Stated otherwise, greater uncertainty and liability for online intermediaries may have a more significant impact on Internet startups than a recession. *See* Matthew Le Merle *et al.*, "The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study," Booz & Co., at 6 (2011).[1] Given that imposing unnecessary formalities in order to qualify for the DMCA could inhibit the development and deployment of new online communications 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 DCMA.

Respectfully submitted,

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[1] *Available at* http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf