



November 28, 2011

The Honorable Maria A. Pallante
Register of Copyrights
United States Copyright Office
Washington DC 20004

Microsoft Corporation submits these Initial Comments in response to the Copyright Office's Request for Comment regarding proposed changes to the process for Designation of Agents to Receive Notices of Claimed Infringement. See 37 CFR Part 201 (59953-599560, September 21, 2011).

Background

Microsoft is one of the world's largest online service providers ("OSP"), with websites accessed daily by hundreds of millions of users worldwide. Our services include information location tools falling within 17 U.S.C. 512 (d), such as the search engine Bing. Microsoft also offers services falling within 17 U.S.C. 512(c), including online services such as Hotmail, Photosynth, HealthVault, and SkyDrive, online marketplaces used by third parties to upload and make available applications and software code, such as Codeplex and Windows Phone 7 Marketplace, and online news, technology, and entertainment sites where users can upload comments, links and media, such as MSN, Wonderwall, and Xbox Live.

The Digital Millennium Copyright Act ("DMCA") is vital to Microsoft's development of these various online services and the public's enjoyment of them. In our role as an OSP, Microsoft works with copyright owners and users who make use of the DMCA's notice and takedown provisions and, on occasion, its counter notice provisions. Microsoft invests significant resources (both personnel and technology) to ensure that rights owners and users have an effective mechanism to notify Microsoft of claimed infringement occurring on Microsoft's websites, to respond expeditiously to notices of claimed copyright infringement, and to facilitate counter notices. Microsoft's efforts to address copyright infringement also include participation with rights holders to develop voluntary guidelines such as the User Generated Content Principles to enable cooperative relationships between service providers, users, and copyright owners regarding claims of infringement.

As a copyright owner itself, including such works as Windows, Microsoft Office and Xbox games, Microsoft undertakes robust and comprehensive online enforcement, both directly via our own antipiracy program and in conjunction with various trade organizations such as the Business Software Alliance and the Entertainment Software Association. These anti-piracy efforts make significant use of the DMCA's notice and takedown procedures as implemented by other OSPs in order to remove material that infringes Microsoft's copyrights.

Impact of Proposed Rules

Microsoft welcomes the Copyright Office's efforts to update and implement the procedures whereby online service providers designate an agent to receive notices of claimed infringement. As a requirement for OSPs to qualify for the limitations of liability under Section 512, Microsoft believes that OSPs should provide sufficient information to enable the public to confirm this designation, and information to facilitate their submission of notices of claimed infringement and counter notices.

However, as explained more fully below, the process should be no more burdensome than necessary to achieve these purposes. A process that requires service providers to provide substantially more than relevant contact information creates the potential for delays in submissions, incomplete submissions, duplication of existing information systems, and errors, without corresponding benefit to the copyright system. While allowing online service providers to provide additional information may provide some benefit, the Copyright Office should create a distinction between the information required under section 512, and additional information that may be helpful but is not mandatory.

In Microsoft's experience, the Copyright Office's OSP directory serves as secondary tool for rights owners to obtain information to send notices of claimed infringement, because most if not all OSPs who have filed a designation of agent post the most relevant and complete information in a readily accessible location on their websites, as required by 17 U.S.C. 512(c)(2). These web pages are easily found via links at the bottom of web pages or through Internet search engines rather than searches of the Copyright Office directory. That directory, therefore, serves primarily as a reference tool for rights owners to verify that an OSP has complied with section 512, and secondarily to confirm any contact information needed by rights owners or users to contact an OSP's DMCA agent, if such additional contact information is not otherwise present on the OSP's website.

Response to Specific Request for Comments

Electronic Filing

Microsoft supports a fully online process for submitting the required information. The Copyright Office should enable efficiencies by allowing service providers to delegate to third parties the ability to submit and file amendments or validations, provided the service provider remains responsible and liable for acts of its delegated agent. Where permitted, the delegated party should be required to provide its own basic contact information (e.g. name, address, phone, and email) in addition to that required of the OSP.

Periodic Validation

Microsoft supports the Copyright Office's efforts to improve its systems allowing OSPs to more easily update their information online. However, given 512(c)'s current requirements that an

OSP maintain current and accurate contact information, we do not think that adding an additional regulatory requirement of regular periodic validation as a condition of continued eligibility is necessary. See e.g. Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004) (An OSP that provides inaccurate contact information faces the loss of the DMCA's safe harbor).

Microsoft supports making prior versions of designation publicly accessible, and requiring email addresses for the OSP, but making only the designated agent's email address publicly accessible. Microsoft supports requiring contact information for the person filing the designation, but not making such information publicly accessible as such information is not necessary for the primary purposes served by the directory.

Microsoft supports allowing online amendments without the need of submitting a new designation provided the Copyright Office supports archiving the prior information.

Overlapping Designations

Microsoft recognizes the challenges of overlapping designations. In Microsoft's experience, overlap occurs most often when companies are acquired, and the acquiring company provides new information. Microsoft supports requiring the seller or the buyer to amend an existing designation or replace it with a new submission as a prior submission expires. For reasons more fully discussed below, Microsoft does not support a solution focused on the service provider's web address.

Content of Designations

Microsoft agrees with the Copyright Office that the information provided in a submission should mirror the current information required under the interim regulation.

Service Provider Identity

Microsoft strongly supports the Copyright Office's recommendation of enabling OSPs to designate a position or title rather than the name of an individual as a means to protect privacy and to address situations within some companies where more than one person might share the responsibility.

Contact Information for the Service Provider and Agent

Microsoft supports the Copyright Office's recommendations regarding required or optional contact information for both the Service Provider and DMCA Agent. Microsoft requests that the Copyright Office include an additional and optional field that permits an OSP or Agent to designate a dedicated URL (e.g. <http://www.microsoft.com/info/cpyrtlnfrg.htm>) for a specific website address that links to the location where the OSP maintains its DMCA contact information or other information or online tools, which may inform users about the OSP's specific process for receiving notices of claimed infringement and/or counter notices. Microsoft believes that this optional field would support the aims of section 512 by enabling those using

the Copyright Office OSP directory to more efficiently locate and contact the most current and accurate information about the OSP regarding notices of infringement or counter notices.

Related Service Providers

Microsoft supports permitting related service providers to file a single, joint designation of agent. The designation should require that the OSPs have a legally cognizable relationship that supports the joint submission (e.g., parent, subsidiary, joint or partial owner) but not require the OSP to state the precise legal nature of the relationship as that specificity is unnecessary to support the purpose of the filing.

Possible Alternative Organizing Principle for Directory: Designation of Web Address

Microsoft does not support requiring separate designations for each web address. Microsoft, like many OSPs, owns thousands of domain names, each of which could be used to operate one of our hundreds of web sites. These domain names are typically used to support a range of activities, including time-limited promotions (e.g. advertisements and online contests), product releases, or mistaken spellings of a company's products. Many of these websites contain online forums or services that contain links or uploaded content that could be the subject of notices of claimed infringement. A requirement that OSPs designate an agent for each domain ignores the reality of how website addresses are currently used, or how their use may evolve in the future. Additionally, the recent expansion of gTLDs will likely exponentially increase the number of website addresses for some OSPs.

A process requiring an OSP to list all website addresses relevant to its designation of agent would be unduly burdensome and expensive on most OSPs. It would introduce significantly more administrative burdens on both the OSP and the Copyright Office in ensuring the accuracy of information related to such website addresses, without any corresponding benefits beyond what is already accessible on the Internet.

It seems that the Office intended this alternative proposal to address the scenario where someone knows a web address but needs to determine where to send a DMCA notice for that address. In our experience, this information is almost always provided directly on web sites or located through basic search tools of the Internet, so there is no real need for the OSP registry to provide that type of search functionality. Indeed, the DMCA currently requires OSPs to provide such information on their applicable web sites. See 17 U.S.C. §512(c) (2).

To assist users with locating additional information relevant to an OSP in the Copyright Office's records, Microsoft instead proposes that the Office consider issuing OSPs a unique identification number corresponding to their submission of a designation of agent, and requiring the OSP to post this number where it also posts information about its DMCA agent and its process for submitting notices of claimed infringement. This requirement would enable users of the OSP directory to easily link a particular website with the DMCA agent designation (and related records) maintained by the Copyright Office.

This process is also similar to other legal registration processes, such as obtaining a business registration, state or federal tax identification number, or other registration requirements, where the public can use an identification number to validate the registration status associated with a particular entity (e.g. contractors, insurance companies), or obtain additional information.

This solution may also obviate the need to regularly update the Copyright Office OSP agent designation, particularly when an OSP adds new or temporary website addresses, or utilizes apps or other technologies which may change frequently or undergo new versions.

Conclusion

Microsoft applauds and supports the Copyright Office's efforts to update and improve the process for designation of agents and the systems to track and report relevant information to the public, so long as these efforts do not unduly increase the burden on OSPs. We welcome the opportunity to provide additional information regarding our comments and proposals, and look forward to additional dialogue on ways to improve the current system.

Regards,

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