

UNITED STATES COPYRIGHT OFFICE

**Notice of Proposed Rulemaking and Request for Comments on Designation of Agent
to Receive Notification of Claimed Infringement**

COMMENTS of MOTION PICTURE ASSOCIATION OF AMERICA

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November 23, 2011

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MOTION PICTURE ASSOCIATION OF AMERICA

The Motion Picture Association of America, Inc. (MPAA)¹ submits these comments in response to the Notice of Proposed Rulemaking and Request for Comments (the "Notice") published in the Federal Register on September 28, 2011, at page 59953.

The Copyright Office seeks comment on proposals to update its interim regulations governing the designation by online service providers of agents to receive notifications of claimed copyright infringement as provided for in the Copyright Act.

By way of overview, the MPAA member companies agree that the currency and accuracy of the information in the online directory of designated agents maintained by the Copyright Office is important to efforts to protect copyrighted content on the Internet. The MPAA member companies believe that the Copyright Office's intention of implementing an electronic process by which service providers designate agents to receive notifications of claimed infringement and an electronic database to search for these agents is a good one. A meaningful search capability is critical to making the Copyright Office database functional for rights holders. It is important that the proposed rules be crafted and implemented in a way that promotes both the maintenance and accessibility

¹ MPAA represents each of the major motion picture studios in the United States, specifically, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Warner Bros. Entertainment Inc., Walt Disney Studios Motion Pictures, and their respective affiliates (the "MPAA member companies").

of current contact information of designated agents while not unnecessarily burdening service providers, which of course include MPAA member companies in their capacities as service providers.²

Electronic Filing

The Copyright Office intends to implement an electronic process for the online submission of forms for designation of agents to receive notifications of claimed infringement. Because the current system is document driven (scanned pdf files), service providers that already have designated an agent will be required to file new designations online. While the MPAA member companies welcome the modernization of the process for designating agents, resubmitting designations through the online form may be costly and burdensome for those companies with a large number of designations if separate manual entry of new forms for every existing designation is required. The Copyright Office should explore ways to make this process more efficient for all parties by allowing the resubmission of existing designations through XML or some other form of electronic transmission allowing for the current library of agents to be populated into the new system.

The Copyright Office has asked for comments on the costs and/or benefits of allowing service providers to delegate, to persons other than their employees, the responsibility for maintaining their designated agent information. In this regard, the Copyright Office raises potential concerns regarding the accuracy of designation information that is not provided by the service provider itself.

The MPAA member companies do not believe that service providers should be prohibited from using outside sources such as law firms or other entities for the administration of

² Taken together, the MPAA member companies act as the service providers in connection with and have designated agents for thousands of websites.

their designated agent information provided that some safeguards are in place. First, regardless of whether the service provider itself or some third party maintains the designated agent information, the service provider itself must be required to assume responsibility for the accuracy of the information provided. Second, it should be made clear that a service providers' use of persons other than their own employees to maintain the designated agent information does not alter in any way the service providers existing obligation to respond to notices of claimed infringement expeditiously under the statutory obligations of the Digital Millennium Copyright Act (the "DMCA"). As the Copyright Office points out in the Notice, "courts may find that incorrect or outdated information constitutes a material failure to comply with statutory requirements necessary for invoking the limitations on liability in section 512." Notice at 59955 (Citations omitted.) In summary, service providers must assume the risk of any inaccuracy in the designated agent information and any delay caused by the use of a third party to administer that information.

Periodic Validation

To address outdated designations (such as those associated with businesses that are no longer operating), the Copyright Office proposes that service providers be required periodically to validate their agent information either annually, every two years, or at some other regular interval. Under the Copyright Office's proposals related to validation, failure to timely validate or amend the designation would result in removal of the record from the directory (and with it DMCA safe harbor eligibility).

While it is important that records are kept up to date to allow rights holders to protect against online infringement of their copyrighted works, periodic validation could impose burdensome costs on service providers and, because inaction *even where an existing designation is accurate* could result in

the loss of safe harbor eligibility, risks being a trap for the unwary. Moreover, because service providers are responsible for maintaining correct designated agent information, are required to respond to notices of claimed infringement expeditiously, and typically want the benefit of the DMCA's safe harbor limitations on liability, service providers should be self-motivated to keep this information current without the necessity of validation requirements. For that reason, the MPAA member companies believe that an effective safeguard against inaccurate information would be for the Copyright Office to make clear in the designation process that failure to keep the records current (in the Copyright Office database and on the service providers own websites) is a basis for losing DMCA safe-harbor protection.

To the extent the Copyright Office also requires validation on top of clear statements regarding the impact of failure to keep designation information current, it should allow a process whereby a service provider that controls multiple designations can annually validate all the designated agent information for all of those designations at once in an automated manner, rather than having to individually validate every individual record at periodic intervals tied to the calendar date of each initial designation.

With respect to validation, the Copyright Office proposes using a "versioning" approach, wherein any changes to the agent designation would generate a new version of the record available on the Copyright Office website, while also maintaining all prior versions as public records available to show what information was in the directory at any given time. The Copyright Office asks whether these prior versions should be made available via the Copyright Office's public website.

The MPAA member companies believe that listing prior versions of agent designations on the public website could run the risk of creating confusion as to which entry is the current designation and result in the incorrect person being sent notifications of claimed infringements and result in less than expeditious action related to infringing content. This potential

confusion would be eliminated if only the current designated information is displayed on the public website. Alternatively, prior versions of the designated agent records might reasonably be made available through the Copyright Office's public website if it is done via a separate location that makes clear the historical context of those versions.

The Copyright Office also proposes requiring contact information for the person filing the designation if that information is different from the contact information provided for the online service provider as well as alternative contact information for the service provider itself. The MPAA member companies have no objection to requiring the provision of this information to the Copyright Office. However, because the full contact information of the designated agent should and will be made available to the public via the online directory of designated agents, this additional contact information serves only administrative purposes for the Copyright Office and making this additional contact information available via the public website is not necessary and should not be done.

Amending a Designation

The new system for electronic filing will allow for amendments to records to update them or correct errors in the designation of agents. As proposed, any amendment will require the payment of a fee, even if the amendment simply corrects an error. The Copyright Office seeks comment on whether it should set the fee for interim amendments below the fee for periodic validation.

Given that the Copyright Office proposes to charge fees for both the initial filing of designations and for any required periodic validation, the requirement of the payment of an additional fee for amendments to designations creates a financial disincentive for service providers to keep designations accurate and updated other than through a required periodic validation process. Because the currency of agent information is important and should be encouraged, the

MPAA member companies propose that no additional fees be charged for amendments. Rather than paying a fee for each amendment, it would likely be easier, more efficient, and drive better results in terms of the currency and accuracy of designations simply to set the fees for initial designations or periodic validations at a level that will cover the expected costs of the amendments.

Overlapping Designations

The Copyright Office notes the potential confusion caused by overlapping designations for a single service provider, which may stem from the transfer of control of a site from one party (seller) to another (buyer) without the previous designation being deleted or updated. The Copyright Office presents alternatives for dealing with this issue and requests comments on those proposals as well as the suggestions of other alternatives.

The MPAA members question the viability of a solution to overlapping designations that relies on a requirement that the seller of a website update the existing designation entry, given that there does not appear to be an enforcement mechanism against the seller who fails to do so, and the buyer has limited or no control over the seller's actions. For this reason, the MPAA members suggest that the Copyright Office's electronic filing system could generate a series of automated notifications (on screen and via email) in the event of an overlapping designation.

One way this could work is as follows. If a new service provider designates an agent for a service provider or website URL that already is the subject of prior designation, the Copyright Office's electronic filing system would automatically notify or warn that new service provider of that fact that a designation already exists in the database. Such notification would allow the new service provider (i.e., the buyer) to contact the prior party (i.e., the seller) to inform them that they need to terminate the prior designation. Additionally, an electronic

notification would be sent to the e-mail address on file for the service provider that made the prior designation informing them of the new registration and asking for confirmation that the new registration is intended to supersede the prior designation. This e-mail could provide a link to a landing page with an online form where the service provider could provide confirmation that the prior designation should be removed, in which case the Copyright Office could remove that prior designation. If the service provider who made the prior designation does not confirm that its designation is superseded, both designations can exist in the directory until the time comes for the next periodic validation of the prior designation, at which point it will lapse and go away.

Irrespective of how the Copyright Office ultimately addresses the issue of overlapping designations, there should be a presumption that the contact information provided for agents is valid, and invalid or overlapping information should in no way obviate the requirement that service providers respond to notifications of claimed infringement expeditiously.

Content

The Copyright Office's Proposed Rules call for the service provider to give its full legal name, its physical street address, its e-mail address (new), all alternate names under which it does business, and the name, address, phone number and e-mail address of the agent designated to receive notifications of claimed infringement. The Copyright Office states that some concerns have arisen regarding the harvesting of e-mail addresses and spam e-mail if both the designated agent and the service provider have their e-mail addresses on the Copyright Office's public website. The Copyright Office requests comments on this issue.

With respect to the e-mail addresses of the designated agents, the MPAA member companies agree with the Copyright Office that those e-mail addresses should continue to be submitted in the traditional format (rather than be displayed in text) because the goal of making it easy to locate a service

provider's designated agent and easy to issue a notification of claimed infringement to that agent is best served by the provision of an operable e-mail address (rather than one that must be manually keyed in for notices).

Agent's Identity

The Copyright Office currently allows service providers to designate specific positions or titles (e.g., Copyright Compliance Manager) rather than the proper name of a person as its agent. The Copyright Office is inclined to continue to allow this alternative, given the concerns that personnel changes could otherwise render a designation of agent obsolete. The MPAA member companies agree that job titles or positions should be allowed given that a requirement that proper names be provided would increase the frequency with which designations become outdated, requiring the burden of additional amendments to designations which could be avoided by the use of titles or positions.

While the Copyright Office is inclined to allow for designation of job titles for agents, it is not inclined to allow the designation of an entity (e.g., a law firm or other copyright management entity). The MPAA member companies agree that the designation of third party entities should not be allowed. In addition to increasing the likelihood that notices will not be handled in an expeditious fashion, such designations further complicate the ability of rights holders to efficiently contact the individual responsible for failures to act on notifications expeditiously, to follow up on the status of handling those notices, or take other action.

Unfortunately, the reality of the relative anonymity with which many websites operate means that the designation of the agent for receiving notifications of claimed infringement has often provided the only identifiable individual associated with a "rogue" websites or infringing cyberlockers. This identified individual then gives rights holders one potential recipient for communications and/or the service of process.

The Copyright Office states that it is also inclined to permit the designation of a position or person within the service provider's own organization, as opposed to requiring an unrelated third party to serve as agent, but it is not inclined to allow the designation of multiple agents. The MPAA member companies agree with both these proposals. Requiring service providers to go outside their companies requires unwarranted expenditures and could lead to a lack of familiarity with the website at issue and its operation, and allowing multiple agents to be designated only serves to further complicate the process of notice sending and efforts to guard against content theft.

The Service Provider's and Agent's Address

The Copyright Office proposes to allow a post office box to serve as a designated agent's address. The MPAA member companies believe that it is important that a physical street address be provided for the service provider *and* the agent. A designated agent under the DMCA is a public-facing position – its very purpose is to provide a point of contact for rights holders who need to be able to report claims of infringement. Rights holders must be able to contact that person directly, including by street address if efforts to communicate by phone or e-mail prove inefficient. Allowing for the use of post office boxes would provide a layer of anonymity that is not warranted in this context. An individual who does not wish to provide a physical address available on the Copyright Office's website should not serve as a designated agent.

Related Service Providers

The Copyright Office currently treats related companies (e.g., parents and subsidiaries) as different entities, requiring the filing of separate designations for agents. The Copyright Office is requesting comments as to whether related service

providers (e.g., parent and subsidiary companies) should be permitted to file a single, joint designation of the agent to receive notifications of claimed infringement.

A single service provider may run the operations of the sites of multiple subsidiaries. Where that is the case, a single designation for the service provider is all that is and should be required. The MPAA member companies believe that the filing of a single, joint designation should be an option available for related companies that find it to be more efficient to do so. The Copyright Office points out that the efficiency of this process could be undercut where changes to a designation become necessary, such as where one company changes its address. However, the service provider itself is the entity best placed to make the determination of whether it is more efficient for it to file separately or jointly, in part because it knows its own business and corporate structure and in part because it is the service provider that must bear the risk if information becomes inaccurate. Regardless of whether related companies file joint or separate designations, the service provider will remain obligated to expeditiously respond to notifications of infringement or risk liability.

Possible Alternative Organizing Principle for Directory: Designation of Web Address

The Copyright Office seeks comments on whether requiring a separate designation for each web address is the preferable means of organizing the directory of designated agents.

The DMCA requires the designation of an agent by a service provider, not a separate designation for each site. The MPAA member companies believe strongly that the database should be fully-searchable by website address, but it should not be organized that way. The listing of website addresses should be possible when submitting or updating a designation in the new system, but not required. Requiring a new or amended designation every time a provider launches a new

website address would be a much larger administrative burden than that existing under the current system. The DMCA requires that the service provider make available on its website the name of the service provider. Any implemented rules should reflect that it is adequate that the service provider make clear via each website it operates who the service provider is and how to contact them, including by providing that information directly online and by keeping the records updated in the Copyright Office database.

The Copyright Office also seeks comments on whether separate designations of agents should be permitted for subdomains and folders within a domain. The separate designation of agents for subdomains and folders should not be permitted unless the subdomains and folders are truly separate entities. Routinely allowing the designation of an agent for a subdomain raises the potential for confusion. The DMCA clearly contemplated a single designated agent for a site. Why a single agent is preferable is evident when looking at websites like Geocities, which allowed individual users to maintain webpages hosted by Geocities on its site. It is estimated that before Geocities shut down it had approximately 38 million user-built pages – i.e., 38 million unique URLs all hosted by Geocities. The burden that would have been placed on the Copyright Office had a separate agent been designated for each of these pages is palpable and the confusion such designations would have created for rights holders also is apparent. The rules related to the designation of agents should continue to require the designation of an agent for the service provider of the top level domain in situations such as that presented by Geocities.

Where a web site is being operated via a subdomain and is not hosted by the service provider of the top level domain, then there could be a reason to allow designation of an agent for the service provider operating the site at the subdomain. But such a designation still creates potential confusion in that people will not know to look for the agent of a subdomain, as opposed to the agent for the top level domain, and the goal of

providing an efficient means of contacting the designated agent will be jeopardized. If the Copyright Office allows the designation of separate agents for subdomains, there needs to be a mechanism to deal with this complexity and potential confusion. One way to do this might be to require that the service provider's designation list all subdomains that have separate agents in a sub-list (perhaps indented or otherwise set off) beneath the listing of the agent for the top level domain. This is only one possible solution. There well may be others.

The Copyright Office also asks for comment on whether service providers should be able to file designations with reference to the name of an "app" (an application), rather than a web address. The MPAA member companies recognize that an app name could be an additional name listed on the electronic form for designations and be searchable, but the app itself should be required to provide a mechanism to identify who the service provider is (whether through its terms of service, through a link to the web site, or some other means). Moreover, as set forth above, the MPAA member companies view is that the database should continue to be *organized* by the name of the service provider. However, the database should be fully searchable and sortable by web address, app, and agent name, whereby a record for one links to the others. For ease of sorting and consistency of listing, the Copyright Office should require that web addresses be consistently listed without prefixes such as "www."