Before the
United States Copyright Office
Library of Congress
Washington, D.C. 20559

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

COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge ("PK") submits these comments in response to the Copyright Office's Notice of Proposed Rulemaking and Request for Comments, released September 28, 2011,[1] to update its regulations governing online service providers' designation of agents to receive notices of alleged copyright infringement.

INTRODUCTION

The Digital Millennium Copyright Act's ("DMCA") safe harbor provisions represent a carefully-considered balance between encouraging innovation in online services and platforms and copyright owners' interest in stopping and preventing infringement.[2] PK applauds the Copyright Office's efforts to update the directory of service providers' designated agents and improve the process for designating agents. An effective, efficient electronic database will be more convenient for service providers seeking to obtain the protections of the DMCA safe harbor and will benefit copyright owners by generating a larger, easily searchable database. In revising the agent designation process, the Copyright Office should seek to establish a system that creates a robust and complete database while imposing minimal burdens on service providers.

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[1] Designation of Agent to Receive Notification of Claimed Infringement, Notice of Proposed Rulemaking and Request for Comments, 76 Fed. Reg. 59,953 (Sept. 28, 2011) (hereinafter "Agent Designation NPRM").

[2] *See* 17 U.S.C. § 512(c).

I. THE AGENT DESIGNATION PROCESS SHOULD IMPOSE AS LITTLE REGULATORY BURDEN ON SERVICE PROVIDERS AS POSSIBLE.

Consistent with the language and intent of the DMCA, the Copyright Office should approach its responsibility to create a directory of agents as a purely administrative function. The Copyright Office should aim to efficiently and effectively accept the information submitted by service providers and make that information available to the public, but the Copyright Office should not impose upon service providers additional regulatory burdens not contemplated by section 512.

A. The DMCA Safe Harbor was Designed to Provide Certainty to a Broad Range of Eligible Service Providers.

Congress enacted the DMCA to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education . . . ."[3] Congress intended to promote a diverse environment of new, valuable online services by limiting the liability of service providers.[4] The language of section 512 reflects this: any "service provider" that engages in one of the listed activities and meets the appropriate qualifications receive a limitation of liability.[5]

For the purposes of the Copyright Office's agent directory, the relevant category of service providers consists of those that store material at the direction of a user "on a system or network controlled or operated by or for the service provider," if the service provider meets section 512(c)'s knowledge, financial

[3] S. REP. No. 105-190, at 1-2 (1998).

[4] *Id.* at 8.

[5] *See* §§ 512(a)-(d).

benefit, and takedown requirements.[6] The service provider is not obligated to comply with section 512(c)'s requirements, but if it does not comply, the provider does not receive safe harbor protection.[7] Importantly, the range of entities that could qualify for a liability limitation under section 512(c) is extraordinarily broad, including cloud storage services, blogs or online newspapers that allow user comments, retail websites with a user review function, web-based email or document services, and online marketplaces. This means that many service providers that qualify under section 512(c) are hobbyists or small businesses that are not familiar with the complexities of the DMCA and spend little time thinking about qualifying for section 512 safe harbors. These service providers are best served by a simple, undemanding agent registration process.

B. The Copyright Office Can and Should Transport the Existing Agent Directory Into the New Database Without Requiring Service Providers to Re-File.

PK urges the Copyright Office to incorporate existing agent designations into the new agent directory without requiring service providers to re-file their agent designations. Section 512 offers a trade-off to service providers: if the service provider accepts the burdens and fulfills the obligations of section 512 then the service provider in returns receives a limitation on secondary liability. The Copyright Office's statutory directive in this scheme is purely administrative, so the Copyright Office should not adopt procedures that would impose burdens on service providers beyond those contemplated by the statute. This is particularly important

[6] § 512(c)(1).

[7] § 512(c).

considering the broad scope of possible "service providers" on the Internet, which spans from an individual's blog to a large corporation's data hosting service. Moreover, the cost of automatically migrating the existing database into the new directory is likely far less than the aggregate cost of requiring every service provider to manually re-file its agent designation.

1. The Copyright Office Should Not Impose a Re-Filing Requirement Not Contemplated by Section 512.

The safe harbor provided under section 512(c) specifically names the obligations that service providers must meet to obtain a limitation of liability.[8] To receive the safe harbor, a content-hosting service provider must meet certain knowledge requirements, lack a direct financial benefit from infringement, remove material named in a takedown notice, and designate an agent to receive takedown notices.[9] As part of the agent designation requirement, a service provider must make the agent's contact information available on its website and provide the agent's information to the Copyright Office.[10] By its own language, the statute does not require a service provider to ever re-file or validate a designation that is still accurate.[11] Rather, the statute motivates service providers to ensure their agent designations are up-to-date by denying the liability limitation to any service provider whose agent designation does not substantially fulfill the statutory

[8] *Id.*

[9] §§ 512(c)(1)-(2).

[10] § 512(c)(2).

[11] *Id.*

requirements.[12] Section 512(c) also explicitly states the Copyright Office's role in this system: namely, maintaining a current directory of agents based on the information it receives from service providers, requiring additional contact information in its discretion, and charging a fee to cover the costs of the directory.[13] The statute does not authorize the Copyright Office to require service providers to file new designations when their current designations are still legally valid. Rather, the Copyright Office's duties in this regard are administrative: accepting the information submitted to it by service providers and making that information publicly available. The Copyright Office should strive to meet these responsibilities without creating obligations above and beyond the scope of section 512.

Refraining from imposing new extra-statutory obligations on service provider is particularly important given the broad category of entities potentially eligible for protection under section 512(c). As discussed above,[14] a wide variety of individuals and entities host material at the direction of users, and many of those service providers are small-scale operations: bloggers, small online retail operations, or any start-up businesses that provide cloud storage as part of their user-generated content services. The burden of new obligations beyond what is created or authorized by the statute will disproportionately fall on small operators that lack legal departments or law firms on retainer to keep them updated on new regulatory responsibilities.

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[12] *Id.*

[13] *Id.*

[14] *See supra* Section I.A.

Fortunately, the Copyright Office can avoid imposing a re-filing requirement with relatively little cost by migrating the current directory onto the new database. Since the Copyright Office has chosen to store interim agent designations in a non-searchable PDF format, the Copyright Office could use an automated optical character recognition program and transport those searchable files into the new database. To ensure accuracy in transcription, the searchable database entries could also contain links back to the PDF page from which the information was scanned, allowing a prospective notice sender or a diligent service provider to check the accuracy of the migrated information. This may result in some initial redundancy, but will nevertheless ensure that the database provides all of the information required by the DMCA for safe harbor eligibility.[15] Inevitably, there will be migration of some outdated designations, but Congress has already decided that the threat of secondary liability alone is sufficient to encourage service providers to maintain accurate agent designations. To the extent that service providers neglect to do so, they face losing the safe harbor provided by section 512(c). Therefore, the Copyright Office should incorporate its current directory into the new database without requiring every service provider to file another agent designation.

2. <u>If the Copyright Office Implements a Re-Filing Requirement, the Requirement Should Impose a Minimally Burdensome Obligation on Service Providers.</u>

If the Copyright Office does implement a re-filing requirement, it should strive to minimize the burden of re-filing by giving service providers notice and ample time to re-file their currently valid designations in the new directory. The

[15] *See* § 512(c)(2).

Copyright Office should send notices to the designated agents in the current directory about the new re-filing deadline. Since the interim regulations already required service providers to provide their agents' mailing and email addresses,[16] this could be as simple as mailing a postcard or sending a mass email. This relatively small cost would provide a significant benefit to service providers who have dutifully and in good faith complied with the safe harbor rules but might not be aware that their obligations have changed with the new regulations. This would also likely increase the percentage of service providers that quickly re-file their designations, resulting in a more complete, effective database.

Additionally, the Copyright Office should not require service providers to pay another submission fee when they re-file their agent designations. A re-filing fee would penalize a service provider for complying with the regulations by imposing twice the economic burden. Service providers that re-file their designations are already performing more work so the Copyright Office may avoid the costs of migrating the existing directory onto the new database. In return, re-filing service providers should not bear the additional burden of paying a second fee for their designations.

C. The Copyright Office Should Not Require Periodic Validation But Should Provide Access to Past Versions of Agent Designations.

PK urges the Copyright Office to refrain from imposing a periodic validation requirement on service providers. Similar to the proposed re-filing obligation

[16] 37 C.F.R. §§ 201.38(c)(4)–(5).

discussed above,[17] this requirement is an additional burden outside of the scope of responsibilities that Congress chose to give service providers in exchange for a limitation on liability. Section 512(c)(2) only requires that a service provider's agent designation accurately provide the required contact information. If the contact information is five years old but nevertheless entirely accurate, the designation is legally valid and the service provider benefits from the safe harbor. If the contact information becomes out-of-date and thus fails to meet the service provider's obligations under section 512(c)(2), the service provider risks losing its limitation on liability. Congress has decided that this consequence is sufficient to motivate service providers to maintain accurate agent designations, and the Copyright Office should not attempt to upset that balance. Moreover, section 512 does not authorize the Copyright Office to create new filing requirements for service providers, beyond altering the contact information included in the designation.[18] Also, as with the re-filing requirement, periodic validation will disproportionately burden individuals and small businesses.[19] As a result, both the statutory text and policy ramifications weigh against a periodic validation requirement, and the Copyright Office should not impose such an obligation.

Regardless of whether the validation process is implemented, the Copyright Office should make prior versions of providers' entries available to the public. Versioning would aid both copyright holders and providers trying to establish whether a provider qualifies for safe harbor protections, and may also assist

[17] *See supra* Section II.B.

[18] *See* 17 U.S.C. § 512(c)(2).

[19] *See supra* Section II.B.

academics or other scholars researching the efficacy of the DMCA regime. To avoid confusion, the Copyright Office could clearly mark the most current version of the designation. With reasonably marked versions, the benefits of immediate access would significantly outweigh possible confusion.

D. The Designation Amendment Process Should Be Streamlined and Affordable to Encourage Accurate Records.

PK supports an efficient and easy amendment process for agent designations. The Copyright Office's proposal to permit service providers to amend only the out-of-date information in their designation and retain correct information from previous submissions[20] will prevent service providers from inadvertently creating incomplete records. The agent designation process should encourage and help service providers to maintain DMCA-compliant records that ultimately benefit copyright owners seeking to assert copyright infringement claims. By making the amendment requirements more intuitive and easier to fulfill, the Copyright Office will be aiding both service providers and copyright owners.

II. THE COPYRIGHT OFFICE SHOULD ACCEPT DESIGNATIONS OF ALL LEGALLY-QUALIFIED AGENTS.

The Copyright Office should accept designations of all agents that meet the legal requirements of section 512(c)(2), without prejudice based on any theoretical likelihood that the designated agent may not adequately respond to possible future notices of alleged infringement. PK urges the Copyright Office to permit service providers to designate a named person, specific title or office, or entity as their

[20] Agent Designation NPRM at 59,955.

agent for the purpose of section 512(c).[21] By its own language, the DMCA does not limit designated agents to specific persons or titles.[22] In fact, one federal court explicitly noted that designating an entire department as an agent satisfies the statute.[23] In proposing to prohibit service providers from designating entities as agents, the Copyright Office expressed concern that a takedown notice sent to an entity, as opposed to a named person or specific title, would not be responded to in a timely manner.[24] This correlation, however, is unsupported by evidence and in any event is only relevant to whether a service provider should receive a safe harbor, not whether a service provider should be able to register an agent. Such a question is best answered by a federal court, not by a procedural rulemaking.

The Copyright Office should not prevent the registration of agents based simply on a hunch that the agent will fail to comply with the rest of the DMCA safe harbor requirements. Whether its designated agent is a person, office, or entity, the DMCA requires a service provider "upon notification of claimed infringement . . . respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity,"[25] or lose the benefits of the safe harbor. The administration of a service provider's agent designation is entirely separate from the provider's obligation to respond to takedown notices. Since private parties already bear legal responsibility for the smooth operation of

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[21] *See id.* at 59,957.

[22] *See* § 512(c)(2).

[23] *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1092 n.13 (C.D. Cal. 2001).

[24] Agent Designation NPRM at 59,957.

[25] § 512(c)(1)(C).

the notice and takedown procedure, the Copyright Office need not foreclose a service provider from registering at all simply because that provider might, in the future, fail to satisfy other DMCA requirements.

III. AGENT DESIGNATION FEES SHOULD BE AS AFFORDABLE AS POSSIBLE AND COVER ONLY THE COSTS OF THE DIRECTORY.

PK strongly supports the Copyright Office's proposal to conduct a cost study and further rulemaking to determine appropriate filing fees,[26] and urges the Copyright Office to diligently ensure that agent designation fees are only as high as they must be to ensure the operation of the directory. The Copyright Office's proposals to automate more of the designation process will likely reduce maintenance costs. Additionally, if the Copyright Office's plan to charge a fee to validate a provider's designation[27] results in service providers paying fees much more frequently, the per-filing fee should consequently drop dramatically.[28]

The Copyright Office should calculate the necessary filing fees by amortizing the cost of the database over the entire life of the database. The Copyright Office notes that, initially, part of the fee will be used to recoup the initial costs of the database.[29] This presumably either means that the fee will be higher for an initial period of time, or that after the initial period part of the fee will go toward something other than the costs of the database. Either situation would be

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[26] *See* Agent Designation NPRM at 59,956.

[27] *See id.*

[28] For example, according to the Agent Designation NPRM, some service providers have as many as 3,000 alternative names. Agent Designation NPRM at 59,956. If one such service provider had to pay the current fee rates every year to validate its designation, that would impose a $9,105 annual cost on the service provider. *See* 37 C.F.R. § 201.3(c)(16).

[29] Agent Designation NPRM at 59,956.

inappropriate. The Copyright Office should not impose a temporarily high filing fee because this would effectively penalize service providers who happened to file shortly after the new regulations take effect, and may discourage service providers from registering until the fee drops. Alternatively, diverting filing fees to cover the costs of something other than the directory would be contrary to the Copyright Office's statutory authority to "require payment of a fee by service providers to cover the costs of maintaining the directory."[30] Thus, the Copyright Office should, after further notice and comment, implement a cost structure that is as low as possible and tailored to only support the necessary costs of the agent directory.

IV. THE COPYRIGHT OFFICE SHOULD NOT REQUIRE SERVICE PROVIDERS TO SUBMIT SEPARATE DESIGNATIONS FOR EVERY DOMAIN NAME THEY USE.

The Copyright Office should not require a separate agent designation for each individual website address that a service provider owns. Online service providers often register multiple domain names that resolve to the same Internet protocol address, so many entities that can currently submit only one designation would be subjected to onerous filing and fee requirements simply for registering multiple domain names to better reach their audience. Moreover, multiple agent designations for the same service provider would not make the directory more efficient, because the provider would likely still only have a single agent who controlled the provider's responses to takedown notices.

If the Copyright Office seeks to improve the search function of the new agent directory by allowing copyright owners to search by domain names, the Copyright

[30] 17 U.S.C. § 512(c)(2).

Office can require service providers to list their domain names as separate fields in the agent designation form. The Copyright Office could then easily make the domain names searchable; even a simple spreadsheet could make any form field searchable and allow users of the directory to find the appropriate service provider. However, even this may result in too burdensome amendment requirements for providers that frequently obtain new domain names, even if those amendments do not make the service provider actually easier to find by a copyright owner. The Copyright Office should carefully consider how to handle service providers' use of multiple domain names, and in any event should not require new designations for every domain name.

CONCLUSION

The agent designation process is an important component of the DMCA safe harbor framework, and PK urges the Copyright Office to help both service providers and copyright owners by implementing an efficient and effective designation process.

Respectfully submitted,

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