

Before the
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS

In the Matter of
Designation of Agent to Receive Notification of Claimed Infringement
37 CFR Part 201
Docket No COLC-2016-0006-0001

Comments of Electronic Frontier Foundation
and other public interest groups and advocates
June 24, 2016

Submitted by:

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We submit these comments in response to the Copyright Office's Notice Of Proposed Rulemaking And Request For Comments dated May 25, 2016. These comments were principally prepared by:

- The Electronic Frontier Foundation (EFF), <https://www.eff.org>. EFF is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF and its 23,000+ dues-paying members have a strong interest in assisting the

courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. EFF has registered an agent with the Copyright Office.

- The Organization for Transformative Works (OTW). The OTW is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. The OTW has registered an agent with the Copyright Office.
- Eric Goldman, Professor at Santa Clara University School of Law. Professor Goldman has taught and researched in the area of Internet copyright law for over 20 years.

We appreciate your request for comment regarding the fees for registering a Digital Millennium Copyright Act (DMCA) copyright agent via the new electronic registration system. We expect that an electronic registration system will be much appreciated by the many sites and platforms that currently host user-generated content and rely on the safe harbors to avoid liability for the actions of their users. They will also appreciate low-cost registration fees.

However, we write to highlight our deep concerns regarding the Copyright Office's apparent assumption that the fee will require service providers to renew their agent designations every three years because the proposal does not explain what consequences will occur if the service provider fails to make that renewal. We are equally concerned about the apparent assumption that service providers who have already made a valid agent designation with the Copyright Office would be required to re-register (and pay another fee) because the proposal does not explain what consequences will occur if the service provider fails to re-register or pay the additional fee.

We believe that once a service provider has made a valid designation, the designation should remain effective in the Copyright Office indefinitely, for at least three reasons: (1) 17 U.S.C. §512(c)¹ already has too many conditions; (2) §512's formalities already inhibit small service providers from enjoying the safe harbor; and (3) §512 already deprives service providers of protection if they do not accurately maintain their designations. For these reasons, we oppose any proposal to disqualify a service provider from the safe harbor for failing to maintain its agent registration with the Copyright Office, whether because the service provider failed to pay the appropriate renewal fee, failed to re-register an existing valid registration, or failed to take any other future action after a valid registration has been made.

If the hidden consequence of the Copyright Office's proposed lower agent registration fees is a higher risk that an unsuspecting provider will lose §512's safe harbor protections because it failed to renew, then the real cost of the new system is far too high. Therefore, we request that the Copyright Office offer a cost-effective option letting providers make only a single one-time registration to remain permanently effective.

¹ All subsequent statutory references are to Title 17 unless otherwise specified. We focus our discussion on §512(c) although the registration applies to other parts of §512.

I. Section 512(c) Already Has Too Many Conditions.

As EFF and Professor Goldman explained in comments filed in 2011,² a service provider wishing to qualify for §512(c)'s safe harbor must already satisfy 12 conditions:

- 1) Qualify as a “service provider”;
- 2) Show the material was stored at direction of a user;
- 3) Adopt a policy to terminate repeat infringers;
- 4) Reasonably implement that policy;
- 5) Communicate that policy to users;
- 6) Accommodate “standard technical measures”;
- 7) Designate an agent to receive §512(c)(3) notices;
- 8) Post its agent’s contact info on its website;
- 9) Not have actual knowledge of infringement or an awareness of facts/circumstances that infringement apparent (no “red flags”);
- 10) Not have the right/ability to control infringement;
- 11) Not have a direct financial interest in the infringement; and
- 12) Expediently respond to §512(c)(3) notices.

If the Copyright Office creates an agent renewal condition, that would add a *thirteenth* condition for service providers seeking a successful §512(c) defense to a copyright claim.

The new condition would have significant consequences: an otherwise-protected service provider could, if found liable for copyright infringement under the substantive liability standards, be exposed to a massive—and potentially business-ending—damage award that could reach millions (or even billions) of dollars for forgetting to renew or maintain the agent designation on time.

This is not an illusory risk. We have seen numerous well-meaning service providers denied a §512 safe harbor for failing to adhere precisely to the statutory requirements.³ Furthermore, certain law firms look for technically noncompliant sites to sue, even when the site responds immediately to a takedown notice. A new formality would give these law firms additional leverage in abusive lawsuits; and opportunistic plaintiffs could monitor the registration database and pounce on any service providers whose registrations lapse.

In other contexts, the Office and Congress have recognized that renewal conditions are rarely appropriate in copyright, given the fact that many people use the system but are not experts and do not have legal counsel. Renewal conditions for copyright terms were abolished out of concern for inadvertent and unjustified forfeiture of legal rights; this concern is equally applicable to the DMCA. For example, Congress expressed concern about the “harsh consequences of inadvertent forfeiture” of copyrights due to failure to renew and the inequity of

² Available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/eff.pdf>.

³ See, e.g., *BWP Media USA, Inc. v. Hollywood Fan Sites LLC*, 115 F. Supp. 3d 397 (S.D.N.Y. 2015); *Perfect 10, Inc. v. Yandex N.V.*, 2013 WL 1899851 (N.D. Cal. May 7, 2013); see also Eric Goldman, *Good News/Bad News About the Number of Blogs Eligible for the 17 USC 512 Safe Harbor*, TECH. & MKTG. L. BLOG, Nov. 7, 2011, http://blog.ericgoldman.org/archives/2011/11/goodbad_news_ab.htm.

allowing innocent “recordkeeping” failures to affect rights, especially given that the U.S. condition was unique.⁴ Indeed, Congress characterized the renewal condition for extended copyright protection as “one of the worst features” of copyright law prior to the 1976 Act because it was burdensome and could result in the “inadvertent and unjust loss of copyright.”⁵ The Copyright Office echoed those concerns, observing that “[T]he renewal provision of the current law is a highly technical and rigid formality, and it often results in the unfair and unintended loss of copyright protection.”⁶

The same concerns exist here, including the concern for conditions not present in other national systems.

More generally, the history of the Copyright Act clearly demonstrates that if Congress wanted to put an agent renewal condition into the law, it knew how to do so. The Copyright Office’s authority to make regulations for receiving DMCA agents’ designations does not include authority to add additional conditions to §512(c) itself, and the Copyright Office has not identified any legislative grant that provides it with such authority.

II. Section 512’s Formalities Are Already a Barrier for Small Providers.

Thousands of service providers have filed designations, and many large service providers know of the statutory conditions and have satisfied them. However, the existing registrants represent only a small fraction of service providers who might benefit from §512; many smaller service providers have not registered agents. This is not because they do not want §512’s protections or because the agent designation fee has been cost-prohibitive; but because they either do not know of the conditions, find them too complicated or onerous to meet, or cannot afford legal counsel to advise them on satisfying them.

Complying with an agent renewal condition may sound fairly easy, but undoubtedly it will prove challenging to many service providers. Engine, a non-profit organization that works with technology startups, reports that, based on its experience, many companies that have active DMCA agent registrations have insufficient in-house legal resources. Without the capacity or knowledge to monitor for new regulations or ensure that formalities like agent registration are up to date, these companies risk exposure to enormous financial liability for failing to satisfy a technicality that is not likely to result in any harm to copyright owners (since OSPs must continue expeditiously processing takedown notices to qualify for the safe harbor). For small businesses, however, even a short delay in renewing an agent’s registration could be ruinous, as a single secondary infringement finding could be sufficient to bankrupt many startups and other small businesses.

Launching an electronic registration system shows that the Copyright Office is taking demonstrable steps to make it easier for service providers to qualify for the §512 safe harbors. Imposing an agent renewal condition would be counter-productive to that objective.

⁴ See S. Rep. No. 102-194 at 1, 5-6 (1992).

⁵ See H.R. Rep. No. 94-1476, at 134 (1976).

⁶ See *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong. 2082 (1975).

III. §512 Already Deprives Service Providers of Protection If They Do Not Accurately Maintain Their Designations.

The statute already imposes a condition for safe harbor protection that service providers post valid contact information on their website, and no evidence shows that outdated designations have harmed copyright owners or undermined §512's notice-and-takedown mechanism at all—let alone at a level that justifies the additional burden.

IV. The Revenue Generated Through Renewal Fees Does Not Justify the Risk.

To the extent the Copyright Office intends to rely on renewal fees to pay for the program, its own estimates suggest there are better ways to accomplish that goal. According to the NPRM, there are 23,300 current registrations and it is likely that 75-85% of those are still valid and will likely be renewed if renewal is required.⁷ If 75% of those registrants renewed, that would be about 17,500 re-registrations.⁸ Averaged out over 3 years, that would be 5,800 renewals/year. The NPRM also estimates a total of 7,000 total registrations a year, which suggests that the Office anticipates 1,200 new registrations to supplement the renewals.⁹ Finally, the Office estimates that it requires \$41,000/yr to run the registration process.¹⁰

Assuming only 1,200 new registrations per year, the Office could simply charge those 1,200 registrants a one-time fee of \$34 – more than \$6 to be sure, but still not a large sum and still dramatically less than current registration fees. If the number of new registrants is smaller, the fee could be raised, but would likely remain manageable.

⁷ Notice of Proposed Rulemaking, *Designation of Agent to Receive Notification of Claimed Infringement*, Fed. Reg. Vol 81, No. 1010, 31353-54.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

V. Conclusion

Congress expected service providers to satisfy agent designation formalities initially, but Congress did not indicate that it wanted legitimate businesses to forfeit safe harbor protection due to simple mechanical mistakes or inattention to ongoing formalities. Therefore, the Copyright Office should ensure that no service provider will forfeit a valid agent designation for failing to take future steps or pay additional fees; or at minimum it should add a cost-effective option letting providers make only a single one-time registration permanently effective.

Respectfully submitted,

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Additional signatories:

Association of College and Research
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Association of Research Libraries

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Internet Archive

Open Source Hardware Association

Public Citizen, Inc.

Public Knowledge

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