

CHANGING THE PROCESS FOR DESIGNATING DMCA AGENTS

by George M. Borkowski¹

A pending development in the Copyright Office will result in significant changes in the way an online service provider must designate an agent to receive notice of claimed copyright infringement under the Digital Millennium Copyright Act (DMCA). As you will recall, an ISP that wants to invoke safe harbor protection under the DMCA for claims of copyright infringement by its users must, among other things, designate an agent to receive notice of claimed copyright infringement from content owners. Failure to designate such an agent will make an ISP ineligible for DMCA safe harbor protection.

The current method of designating a DMCA agent is based on interim regulations that were promulgated by the Copyright Office when the DMCA was enacted in 1998. Under the current rules, an ISP submits the name and contact information for its DMCA agent in a paper filing with the Office, which then maintains the information. There is no enforceable requirement that this information be updated or maintained in a current state. That obviously can create problems when designated agents change, or companies are bought or sold, or other changes occur at the ISP.

In recognition of these issues, the Copyright Office is proposing to amend its practices governing the designation of a DMCA agent by online service providers. The proposal is to implement an electronic process under which service providers would designate DMCA agents to receive infringement notices. If these new regulations are implemented, all online service providers would need to file new designations of agents within one year of the implementation of the new regulations.

The major proposed changes include the following:

- Implementation of an electronic (not paper) process, including an online submission form, by which service providers may designate agents to receive notice of claimed infringement, and the creation of an electronic database to search for designated agents. ISPs that have already designated an agent under the current regulations will be required to file new designations. The Office will no longer accept paper submissions.
- Any service provider that has filed an online designation of agent will be required periodically (most likely, every two years) to validate the information in its designation to keep the directory accurate. Should an ISP fail to validate or amend its designation within the allotted time, the designation would expire and be removed from the directory. This is significant, given that failure to have a designated DMCA agent will make an ISP ineligible for DMCA safe harbor protection.
- In addition to providing information about its designated agent, a service provider also would need to state its full legal name, physical address, and email address (in addition to

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that of its agent) so that the Copyright Office can send validation notifications to both the ISP and its designated agent. Part of the reason for this proposal is to make it harder for rogue companies to hide from content owners who accuse them or their users of engaging in copyright infringement.

- The requirement of an actual signature would be eliminated. The thinking is that, because all online filings will require the creation of an online account as well as payment of the accompanying fees with a credit card, checking account, or Copyright Office deposit account, the online system will reasonably be able to verify and authenticate the identity of the person submitting or amending the agent designation information.

There are additional proposals on more minor points that I have not mentioned here. Whatever final regulations are implemented, it will be important for online service providers to submit and update DMCA agent information as required by the Copyright Office so as not to lose eligibility for the DMCA's safe harbors.

The time for comments and reply comments closed on December 27, so we should expect new, final regulations in the not too distant future. The proposed rules, plus comments from interested parties, can be found at the Copyright Office at this link:

<http://www.copyright.gov/onlinesp/NPR/>.

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