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Recording Date – September 7, 2017

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Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Thursday, September 7, 2017	12:00 PM to 1:15 PM	Recent Changes to Copyright Office Safe Harbor Regulations (AKA Making Copyright Great Again)

AGENDA

12:00 PM Introduction

12:10 PM Presentation: ‘Recent Changes to Copyright Office Safe Harbor Regulations (AKA Making Copyright Great Again)’, by Chris Varas, Kilpatrick Townsend and Stockton

- Overview of the Digital Millennium Copyright Act safe harbor for infringing content uploaded by third parties.
- Statutory requirements for safe harbor immunity under 17 U.S.C. s. 512(c).
- Recent changes to Copyright Office regulations governing the designation of agents to receive notice of claimed infringement.

1:15 PM Adjourn

SPEAKER BIOGRAPHY:

Chris Varas, Kilpatrick Townsend and Stockton - Chris Varas is a litigator in the fields of intellectual property and technology, and a partner at Kilpatrick Townsend and Stockton. Mr. Varas focuses his practice on copyright, trademark and right of publicity. Mr. Varas has litigated cutting edge intellectual property and technology issues on behalf of some of the world’s most recognized companies. He routinely represents clients in high profile disputes involving unsettled areas of the law, and has significant experience obtaining and opposing requests for restraining orders and preliminary injunctions.

He has litigated complex multijurisdictional disputes and has also developed sophisticated global litigation and enforcement programs. He has been listed as a "Rising Star" by Super Lawyers in both Washington and Southern California. Mr. Varas has extensive experience with issues relating to cybersquatting, phishing and unauthorized distribution of copyrighted material.

Mr. Varas has published articles dealing with a variety of subjects, including copyright work for hire agreements, the protection of trademark rights in Internet domain names, the use of trademarks in graphical virtual worlds, and the development and execution of intellectual property enforcement programs.

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LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. RM 2011–6]

Designation of Agent To Receive Notification of Claimed Infringement

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: Under the Digital Millennium Copyright Act (“DMCA”), the U.S. Copyright Office is required to maintain a “current directory” of agents that have been designated by online service providers to receive notifications of claimed infringement. Since the DMCA’s enactment in 1998, online service providers have designated agents with the Copyright Office using the Office’s or their own paper form, and the Office has made scanned copies these filings available to the public by posting them on the Office’s website. Although the DMCA requires service providers to update their designations with the Office as information changes, an examination of the Office’s current directory reveals that many have failed to do so, and that much of the information currently contained in the directory has become inaccurate and out of date. On September 28, 2011, the Office issued a notice of proposed rulemaking to update relevant regulations in anticipation of creating a new electronic system through which service providers would be able to more efficiently submit, and the public would be better able to search for, designated agent information. On May 25, 2016, with the electronic system in its final stages of development, the Office issued a notice of proposed rulemaking proposing significantly lower fees for designating agents through the forthcoming online system. As

the next step in implementation, the Office today announces the adoption of a final rule to govern the designation and maintenance of DMCA agent information under the new electronic system and to establish the applicable fees.

DATES: Effective December 1, 2016.

FOR FURTHER INFORMATION CONTACT: Sarang V. Damle, General Counsel and Associate Register of Copyrights, by email at sdam@loc.gov, or Jason E. Sloan, Attorney-Advisor, by email at jslo@loc.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

In 1998, Congress enacted section 512 of title 17, United States Code, as part of the Digital Millennium Copyright Act (“DMCA”).¹ Among other things, section 512 provides safe harbors from copyright infringement liability for online service providers that are engaged in specified activities and that meet certain eligibility requirements.² A service provider seeking to avail itself of the safe harbor in section 512(c) (for storage of material at the direction of a user) is required to designate an agent to receive notifications of claimed copyright infringement by making contact information for the agent available to the public on its website, and by providing such information to the Copyright Office.³ The safe harbors in subsections 512(b) (for system caching) and (d) (for information location tools) incorporate the notice provisions of section 512(c) and thus also require that notices of infringement be sent to “the designated agent of a service

¹ Pub. L. 105–304, 112 Stat. 2860 (1998).

² 17 U.S.C. 512.

³ *Id.* at 512(c)(2).

provider”⁴—that is, an agent that has been designated by the service provider as described above.⁵

The language of section 512(c)(2) makes clear that a service provider must maintain the same contact information required under section 512(c)(2)(A) and (B) both on its website and at the Copyright Office.⁶ A service provider that fails to maintain current and accurate information, both on its website and with the Office, may not satisfy the statutory requirements necessary for invoking the limitations on liability in section 512.

As Congress made clear in enacting section 512(c)(2), its expectation was that “the parties will comply with the functional requirements of the notification provisions—such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently—in order to ensure that the notification and take down procedures set forth in this subsection operate smoothly.”⁷ A service provider’s failure to maintain up-to-date information would be contrary to that congressional intent, and would substantially undermine the statutory regime, as inaccurate or outdated information could significantly affect the ability of a copyright owner to contact a service provider’s designated agent. The end result in such a case

⁴ *Id.* at 512(c)(3)(A).

⁵ *See id.* at 512(b)(2)(E), (d)(3).

⁶ 63 FR 59233, 59234 (Nov. 3, 1998) (“[A] service provider designates an agent by providing information required by Copyright Office regulations both on its publicly available website and in a filing with the Copyright Office.”); *see also BWP Media USA Inc. v. Hollywood Fan Sites LLC*, 115 F. Supp. 3d 397, 403 (S.D.N.Y. 2015) (“[T]he statutory scheme expressly requires two publicly available, parallel sources of a service provider’s DMCA agent information (the service provider’s website and the [Copyright Office] directory) in order for that provider to be shielded by the § 512(c) safe harbor.”); 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 12B.04[B][3] (2015) (“NIMMER ON COPYRIGHT”) (“In addition to providing the foregoing information to the Copyright Office, the service provider must provide the same information to the public.”).

⁷ STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 32 (Comm. Print 1998).

would be the same as if the service provider had not designated an agent at all— notifications of claimed infringement cannot effectively be submitted. Because providing inaccurate or outdated information can be functionally equivalent to not designating an agent, it follows that just as designating an agent is a prerequisite for obtaining safe harbor protection,⁸ keeping that designation current and accurate must be an ongoing prerequisite as well.⁹

Moreover, the statute specifically directs the Copyright Office to “maintain a current directory of agents,” and authorizes a fee to cover the “costs of maintaining the directory.”¹⁰ The purpose of this central repository of designated agent information— separate and apart from the information required to be maintained on each service provider’s website—is “[t]o facilitate easy access to the identity of all designated agents” for public use.¹¹ If designated agent contact information contained in the Office’s directory is inaccurate or out of date, it would significantly hinder the ability of copyright owners to efficiently contact the service provider’s agent. This is especially so because it may be difficult to locate contact information for a designated agent on a service provider’s own website.¹² Thus, in adopting regulations to implement the statute, the

⁸ See 17 U.S.C. 512(c)(2) (“The limitations on liability established in this subsection apply to a service provider *only if* the service provider has designated an agent to receive notifications of claimed infringement”) (emphasis added); see also 4 NIMMER ON COPYRIGHT 12B.04[B][3] (“Section 512 provides that a service provider may take advantage of the instant limitation only if it has designated an agent to receive the notifications of claimed infringement.”).

⁹ Several commenters in this proceeding agree that failing to keep designations current and accurate could result in the loss of safe harbor protection. See *infra* note 89 and accompanying text.

¹⁰ 17 U.S.C. 512(c)(2).

¹¹ See 4 NIMMER ON COPYRIGHT 12B.04[B][3]; see also *BWP Media USA Inc.*, 115 F. Supp. 3d at 402 (citing NIMMER ON COPYRIGHT).

¹² As discussed below, in an effort to assess the accuracy of designations in the existing Copyright Office directory, the Office undertook a comparison of the information contained in designations in the directory against the information on service provider websites. In doing so, the Office also learned that it often takes a significant effort to even locate designated agent information on a service provider’s website, and in many cases the Office was unable to locate the information at all.

Office's ultimate task is to ensure that the directory fulfills its essential purpose as a convenient repository for "current" designated agent information.¹³

Because the DMCA was effective on its date of enactment, and a procedure to enable the designation of agents needed to be in place immediately, the Copyright Office issued interim regulations governing the designation of agents to receive notifications of claimed infringement without the opportunity for a public comment period.¹⁴ While the information required to be provided by the interim regulations was originally submitted to the Office in paper hardcopy, the Office later began accepting scanned submissions of paper designations via email. Once received, the Office then scanned the filings, if necessary, and posted them to the directory on its website.¹⁵ This system has continued to this day.

Over time it has become clear to the Office that the designation process established under the interim regulations needs to be updated to better fulfill the objectives of section 512(c)(2). The paper designation system is inefficient and expensive for service providers, and represents a significant drain on Office resources due to the largely manual process of scanning paper designations and posting them online. Furthermore, the search capabilities of the paper-generated directory, even in its online format, are limited. To effectuate an update of the interim regulations, the Office issued a notice of proposed rulemaking on September 28, 2011 ("NPRM") proposing a new fully-electronic system through which service providers could more efficiently designate agents and maintain service provider and agent information with the Copyright Office,

¹³ See 17 U.S.C. 512(c)(2).

¹⁴ See 63 FR at 59233-34.

¹⁵ See <http://www.copyright.gov/onlinesp/>.

and the public could more easily search for agents in an online directory.¹⁶ At the time of the NPRM, the Office also expressed concern that a sizable portion of the designations in the paper-generated directory appeared to be outdated or for defunct service providers. The Office had examined a small random sampling of designations from the directory, which revealed that a number of existing designations were associated with businesses that had ceased operations.¹⁷ Thus, although the interim regulations required a service provider that ceased operations to notify the Copyright Office of such,¹⁸ it seemed that few actually did so.¹⁹ The Office also noted that although it was unable to “discern the precise percentage of designations that contain outdated information, the number of amended designations that the Office does receive suggests that many designations are probably outdated.”²⁰

In 2013, the Department of Commerce’s Internet Policy Task Force²¹ reiterated concerns regarding the accuracy of the Office’s existing directory in a paper addressing various issues involving copyright and new technologies. Relying on an industry study, the Task Force found that “the database is not current and reliable.”²²

¹⁶ See 76 FR 59953 (Sept. 28, 2011).

¹⁷ 76 FR at 59954.

¹⁸ 37 CFR 201.38(g) (“If a service provider terminates its operations, the entity shall notify the Copyright Office by certified or registered mail.”).

¹⁹ 76 FR at 59954.

²⁰ *Id.*

²¹ The Internet Policy Task Force is a group comprised of various Commerce Department bureaus, including the United States Patent and Trademark Office, the National Telecommunications and Information Administration, the International Trade Administration, the National Institute of Standards and Technology, and the Economic and Statistics Administration. DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, at i (2013).

²² *Id.* at 59 & n.317 (citing a study by the Software & Information Industry Association finding that “nearly half” of emails sent to a sample of designated agents listed in the Office’s directory “were returned as undeliverable” and that “[o]f those that were deliverable, many went without a response”).

More recently, to confirm the NPRM's initial assessment of the quality of the information in the current designated agent directory, the Office examined a larger sampling of 500 existing paper designations and found that approximately 70% either had inaccurate information or were for defunct service providers. Specifically, 110 (22%) appeared to be for defunct service providers.²³ For the remaining, non-defunct service providers, to determine whether a service provider's designation contained inaccurate or outdated information, the Office compared the information provided in the paper designation to the information the service provider currently provides on its own website. As noted above, the DMCA requires a service provider to maintain the same information both on its website and at the Copyright Office. Where there is a discrepancy between these sources, it is fair to assume that the information in the Copyright Office's directory, rather than the information on the service provider's own website, is out of date, as service providers are more likely to update their own websites on a regular basis.

Accordingly, for each of the 390 non-defunct service providers in the sample, the Office assessed whether the telephone number, physical mail address, and email address listed for the designated agent in the Office's directory matched the contact information on the service provider's website. The Office found that the websites for 20 service providers did not appear to contain any contact information whatsoever. Although these service providers' failure to provide designated agent information on their websites renders them ineligible for the section 512 safe harbors, that failure also meant that the

²³ This figure aligns with the estimate made by the Office in calculating the appropriate fee for the new system. In the Office's May 25, 2016 notice proposing the specific fee for designating agents through the new electronic system, the Office estimated that defunct service providers constituted 15-25% of all current designations. *See* 81 FR 33153, 33154 (May 25, 2016). The category of defunct service providers includes service providers that have merged with another service provider. In such cases, the web properties previously owned by the first service provider may still exist, but that service provider itself no longer exists as a going concern.

Office could not ascertain the accuracy of the designations in the Office's directory one way or the other, because there was no information against which to compare. This left the Office with a sample of 370 service providers that had at least some of the required contact information on their websites that the Office could use to compare against the paper designations filed with the Office.²⁴ Out of these 370 designations, 241 (approximately 65%) were out of date, as evidenced by the fact that one or more of the telephone number, physical mail address, or email address listed for a designated agent did not match the contact information on the corresponding service provider's website.²⁵

As this analysis shows, the apparent volume of designations in the Office's directory belonging to defunct service providers or containing inaccurate information is extremely high. These findings are particularly concerning because they show that service providers might unwittingly be losing the protection of the safe harbors in section 512 by forgetting to maintain complete, accurate, and up-to-date information with the Copyright Office. These findings are also concerning because the directory in many cases would seem to be an unreliable resource, at best, to identify or obtain contact information for a particular service provider's designated agent.

²⁴ The Office notes that a number of even these service providers did not provide all three pieces of information contemplated by the statute—the telephone number, physical mail address, and email address for the designated agent—on their websites, instead providing only one or two. In those cases, the Office used whichever piece(s) of contact information that the service provider supplied on the website to compare against the information in the Office's directory. If that information matched, the Office counted the service's provider's designation as accurate and current.

²⁵ This figure includes websites that provided contact information explicitly for a DMCA designated agent as well as websites that only provided general contact information for the site. To break this number down further: The Office found that for approximately 56% of the designations corresponding to websites with contact information specifically for a designated agent, one or more of the telephone number, physical mail address, or email address listed for a designated agent did not match the contact information on the corresponding service provider's website. For service providers with websites that only provided general contact information that did not specifically reference a designated agent, this figure was approximately 84%.

Though the Office did not yet know the full extent of the inaccuracy of the current directory, the Office issued the NPRM with these general concerns of accuracy, cost, and efficiency in mind. In addition to describing the proposed electronic system, the NPRM sought public comment on modified regulations that would govern the submission and updating of information relating to designated agents through such proposed system.²⁶ In response to the NPRM, the Office received comments from trade organizations and others representing the interests of internet service providers and copyright owners.²⁷

To effectuate the system described in the NPRM, the Library of Congress authorized the necessary software development effort through its Information and Technology Services unit (now called the Office of the Chief Information Officer). Over the past year, the Library has committed development resources to this effort and it is

²⁶ See 76 FR at 59953.

²⁷ Computer & Commc'ns Indus. Ass'n, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking ("CCIA Initial"); Elec. Frontier Found., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("EFF Initial"); Google Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("Google Initial"); Google Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Dec. 27, 2011) ("Google Reply"); Internet Commerce Coal., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("ICC Initial"); Matthew Neco, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking ("Neco Initial"); Microsoft Corp., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("Microsoft Initial"); MiMTiD Corp., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("MiMTiD Initial"); Motion Picture Ass'n of Am., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 23, 2011) ("MPAA Initial"); Org. for the Promotion and Advancement of Small Telecomms. Cos., Nat'l Telecomms. Coop. Ass'n, Am. Cable Ass'n, Indep. Tel. & Telecomms. Alliance, W. Telecomms. Alliance, Rural Indep. Competitive All., Joint Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("Telecomm Parties Initial"); Pub. Knowledge, Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("Public Knowledge Initial"); Recording Indus. Ass'n of Am., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking ("RIAA Initial"); Verizon Commc'ns Inc., Comments Submitted in Response to U.S. Copyright Office's Sept. 28, 2011 Notice of Proposed Rulemaking (Nov. 28, 2011) ("Verizon Initial").

now anticipated that the new electronic system to register designated agents with the Office will be launched on December 1, 2016.

As the software development effort was reaching its final stages, the Office on May 25, 2016 issued a notice of proposed rulemaking to lower the fee for designating an agent through the new system (“Fee NPRM”).²⁸ The Fee NPRM proposed reducing the current fee of \$105, plus an additional fee of \$35 for each group of one to ten alternate names used by the service provider, to a flat fee of \$6 per designation—whether registering a new designation, or amending or resubmitting a previously registered designation.²⁹ The Office solicited comments on the proposed change in fees and received a number of comments in response.³⁰

Having reviewed and carefully considered all of the public comments received in response to the NPRM and the Fee NPRM, the Copyright Office now issues a final rule, effective as of the implementation of the new electronic system on December 1, 2016, governing the designation of agents to receive notifications of claimed infringement with the Office pursuant to 17 U.S.C. 512(c)(2), including associated fees. The Register’s authority to implement such system and promulgate these regulations governing the designation of agents and the use and operation of the electronic system derive directly from section 512(c)(2), which explicitly permits the Register to require service providers to supply “contact information which [she] may deem appropriate” and expressly

²⁸ Designation of Agent To Receive Notification of Claimed Infringement, 81 FR 33153 (May 25, 2016).

²⁹ *Id.* at 33154.

³⁰ Ass’n of Am. Publishers, Comments Submitted in Response to U.S. Copyright Office’s May 25, 2016 Notice of Proposed Rulemaking (June 24, 2016) (“AAP Fee”); Computer & Commc’ns Indus. Ass’n, Comments Submitted in Response to U.S. Copyright Office’s May 25, 2016 Notice of Proposed Rulemaking (June 23, 2016) (“CCIA Fee”); Elec. Frontier Found. et al., Comments Submitted in Response to U.S. Copyright Office’s May 25, 2016 Notice of Proposed Rulemaking (June 24, 2016) (“EFF Fee”); Internet Ass’n, Comments Submitted in Response to U.S. Copyright Office’s May 25, 2016 Notice of Proposed Rulemaking (“IA Fee”).

requires the Register to “maintain a current directory of agents available to the public.”³¹ In addition, the Copyright Act gives the Register general authority to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.”³² Sections 512 and 702 together necessarily authorize such regulations as the Register may deem appropriate to ensure both a “current directory” and that the registration system and directory are acceptably “maintain[ed]” for continued usability. As noted, the purpose of the directory is “[t]o facilitate easy access to the identity of all designated agents” for public use,³³ and the rule announced today serves this end by establishing an electronic system that makes it easier for the public to more effectively find current and accurate designated agent contact information.

II. Discussion

The new electronic system to designate agents with the Copyright Office pursuant to 17 U.S.C. 512(c)(2) will fully replace the paper-based system implemented through the interim regulations adopted in 1998. Beginning December 1, 2016, a service provider must use the online registration system to electronically submit service provider and designated agent information to the Copyright Office. Accordingly, as of December 1, 2016, the Office will no longer accept paper designations.

The comments received in response to the NPRM and Fee NPRM indicate widespread support for the creation of an electronic registration system,³⁴ with no

³¹ 17 U.S.C. 512(c)(2).

³² *Id.* at 702.

³³ *See* 4 NIMMER ON COPYRIGHT 12B.04[B][3].

³⁴ *See, e.g.*, AAP Fee at 1-2; IA Fee at 2; ICC Initial at 1; Microsoft Initial at 2; MPAA Initial at 1; Public Knowledge Initial at 1.

commenter suggesting that the paper system should be retained. Indeed, given that online service providers, by definition, operate in an online environment, an electronic-only designation procedure is not only logical but should pose no special burden for service providers. In addition, the electronic system significantly increases the administrative efficiency of the designation process, resulting in a dramatic reduction of costs to the Office and, therefore, in the filing fees to be charged to the service provider community. Such a system also better ensures that service providers will be supplying and maintaining accurate information with the Office by making it easier and cheaper to update designations. The system includes automatic checks to confirm that the requisite information is being provided and will verify certain types of submitted data. Moreover, the electronic registration system seamlessly integrates with the online directory, making it quicker and easier for the public to find a service provider's current designation.

As detailed above, the Copyright Office has confirmed that a substantial amount of the designated agent information currently listed in the Office's directory is inaccurate or out of date. To ensure that the new electronic directory is accurate and up to date, all service providers seeking to comply with 17 U.S.C. 512(c)(2), including those that have previously designated an agent using the paper process under the Office's interim regulations, are required to submit new designations through the electronic system by December 31, 2017. Moreover, the Office made clear that "[i]nterim designations filed pursuant to these interim regulations will be valid until the effective date of the final regulations. At that time, service providers wishing to invoke section 512(c)(2) will have

to file new designations that satisfy the requirements of the final regulations, which will include the payment of the fee required under the final regulations.”³⁵

While service providers must file new designations in the electronic system, they will have over a year to do so. Previously filed paper designations will continue to satisfy the service provider’s statutory obligations under section 512(c)(2) until the service provider registers electronically, or through December 31, 2017, whichever occurs earlier. For a further discussion of this aspect of the final rule, including responses to public comments, see “Phaseout of Paper Directory and Requirement to Register in Electronic Directory” below.

As under the old system, service providers will be required to keep their designations current and accurate by timely updating information in the system when it has changed (*i.e.*, “amending” their designations). Additionally, to help ensure that designations in fact remain current and accurate, a service provider’s designation will expire and become invalid three years after it is registered with the Office, unless the service provider renews such designation by either amending it to correct or update all relevant information or resubmitting it without amendment to confirm the designation’s continued accuracy. This constitutes the requirement to periodically “renew” a designation. Either amending or resubmitting a designation, as appropriate, through the online system begins a new three-year period before such designation must be renewed. The new system, which will include automated reminders to service providers to review and renew their designations, is designed to encourage effective compliance with the requirements of section 512(c)(2). It will also better serve the public by helping to ensure

³⁵ 63 FR at 59234.

that service providers maintain current information about their designated agents, including up-to-date contact information, on file with the Copyright Office, as Congress intended. For a further discussion of these aspects of the final rule, including responses to public comments, see “Amending and Renewing a Designation” below.

A. Registering a Service Provider and Designated Agent

Creating a Registration Account. In order to access the online registration system, a service provider must establish an account that will be used to log into the system and register itself and its designated agent. There is no charge to establish a registration account. Registration of any designation with the Office, including any subsequent amendment or resubmission (see “Amending and Renewing a Designation” below) must be made through such an account. To set up a registration account, the service provider must select a login ID and password, and provide the first name, last name, position or title, organization, physical mail address, telephone number, and email address of two representatives of the service provider who will serve as primary and secondary points of contact for purposes of communications with the Copyright Office. These representatives will receive automated confirmation emails generated by the system and correspondence from the Office, such as notices that a designation needs to be renewed and other communications about the system or account. The Office may also contact these individuals if there are any questions about the designation or registration account. These individuals’ identities and contact information will not be made publicly available in the online directory and are not required to be listed on service provider websites, as the Office is requiring this information pursuant to the Register’s statutory authority to “maintain” the directory, not under her authority to require additional contact information

for inclusion in a service provider's designation.³⁶ The Office's ability to communicate with these individuals is essential to the functioning and continued usability of the registration system and directory.

The Office notes that one commenting party asked that an email address for the individual who actually registered the designation be made available in the public directory.³⁷ The Office declines to adopt this suggestion, as it is not apparent how this information would further the statutory purpose of the directory, which is to ensure that copyright owners can send notifications of claimed infringement to the *designated agent* of a service provider (rather than the individual who may have registered that agent).

In the NPRM, the Office mentioned its willingness to consider allowing a service provider to delegate responsibility for managing the registration process or otherwise administering its account to a third-party entity.³⁸ The Office noted a potential concern with the accuracy of the required information if the information is not supplied by the service provider itself.³⁹ Only one commenter echoed this concern, suggesting that a third party might also fail to follow the directions of the service provider.⁴⁰ Other commenters disagreed with that view, arguing that delegation to third parties is more efficient and would be particularly helpful to smaller service providers with minimal staffing.⁴¹ They explained that third-party firms that provide assistance to service providers have developed the expertise to accurately and efficiently comply with regulatory

³⁶ See 17 U.S.C. 512(c)(2) ("The Register of Copyrights shall *maintain* a current directory of agents available to the public . . .") (emphasis added).

³⁷ RIAA Initial at 2.

³⁸ 76 FR at 59954.

³⁹ *Id.*

⁴⁰ RIAA Initial at 1.

⁴¹ See, e.g., Microsoft Initial at 1-2; MPAA Initial at 3-4; Telecomm Parties Initial at 3.

requirements.⁴² Furthermore, they contended that third parties have every incentive to be accurate so as to establish a positive reputation to retain and grow their client base.⁴³

After considering these competing comments, the Office finds no compelling reason to deny a service provider the option of hiring a third party to manage its designation on its behalf, so long as the service provider is willing to accept the risk that it could lose the safe harbor protections of section 512 if such third party fails to provide accurate information and maintain an up-to-date designation at the Copyright Office. In light of this conclusion, the electronic system has been designed to facilitate third-party management of service provider designations. In particular, a single registrant is able to use a single account to designate agents (and amend and resubmit designations) for multiple service providers.

Registering a New Designation. Once a registration account has been created, an authorized user can log into the account to register a service provider's designation with the Office by providing the information requested by the system, which is described in detail in the section below, "Information Required for Service Providers and Designated Agents."

Related Service Providers. An issue that the Office considered in designing the new system was whether related or affiliated service providers that are separate legal entities (*e.g.*, parent and subsidiary companies) should be permitted to file a single, joint designation.⁴⁴ Under the interim regulations, related companies were deemed to be separate service providers and thus required to file separate designations. The Office has

⁴² Telecomm Parties Initial at 3.

⁴³ *Id.*

⁴⁴ 76 FR at 59958.

received occasional complaints from service providers about the inefficiency of this practice. The NPRM noted the Office's receptiveness to allowing joint designations, but also discussed some of the difficulties it could pose.⁴⁵ Many commenters favored allowing joint designation of related service providers, perceiving it as more efficient and less costly.⁴⁶ One commenter opposed it, stating that the directory's accuracy would be better preserved by continuing to require separate designations.⁴⁷

After reviewing the comments and working with the Library's software development team, the Office has concluded that permitting joint designations as originally conceived in the NPRM would needlessly complicate the online registration system and would also require a significantly more complex and costly development effort. As explained above, the Office has designed the system so that a single account user can register and manage designations for multiple service providers. Thus, a parent company can manage the designations of all of its subsidiaries through one central account should it so choose. The ability of a single registrant to manage multiple designations, combined with the modest fee for registration, set at \$6 (see "Fees" below), should largely address the concerns that would have been addressed by permitting joint designations. Accordingly, under the final rule, as under the interim rule, related or affiliated service providers that are separate legal entities are considered separate service providers, and each must have its own separate designation.

B. Information Required for Service Providers and Designated Agents

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, CCIA Initial at 1; ICC Initial at 5-6; Microsoft Initial at 4; MPAA Initial at 11; Telecomm Parties Initial at 4-5; Verizon Initial at 1.

⁴⁷ RIAA Initial at 4.

The Office has determined that the information required from service providers through the online registration system will remain, for the most part, the same as has been required under the interim regulations. A service provider is required to supply its full legal name, physical street address (not a post office box), telephone number, email address, any alternate names used by the service provider, and the name, organization, physical mail address, telephone number, and email address⁴⁸ of its designated agent. These requirements are described in more detail below. Although the system requires contact information for the service provider, the designated agent, and the primary and secondary contacts for the registration account, the Office notes that the same person may serve in multiple roles so long as the primary and secondary contacts associated with the registration account are different people.

Service Provider's Identity and Alternate Names. The NPRM provided that in addition to the legal name of the service provider, the Office would require a service provider to list any alternate names under which it is doing business (as required under the interim regulations), including any names that the service provider would expect members of the public to be likely to use to search the directory for the service provider's designated agent.⁴⁹ The NPRM explained that such names should enable a copyright owner to identify the service provider and its designated agent.⁵⁰

⁴⁸ The NPRM noted concerns that had previously been expressed to the Office about displaying email addresses on the Office's website, and noted that some had suggested that the Office should display email addresses in a format that could not easily be harvested by automated software and used for spamming purposes (e.g., "userid at domain dot com"). 76 FR at 59956-57. However, no commenter recommended adoption of this suggestion, and instead the system will display traditionally formatted email addresses (e.g., "userid@domain.com").

⁴⁹ 76 FR at 59959.

⁵⁰ *Id.* at 59957.

The Office has modified this provision to clarify that the requirement to provide alternate names is not limited solely to names under which a service provider is doing business, such as a “d/b/a” name. Rather, service providers must list all alternate names that the public would be likely to use to search for the service provider’s designated agent in the directory, including all names under which the service provider is doing business, website names and addresses (*i.e.*, URLs, such as “__.com” or “__.org”), software application names, and other commonly used names. The purpose of this requirement is to identify the service provider sufficiently so that the public can locate the service provider’s designated agent information in the directory.⁵¹

Separate *legal* entities, however—such as corporate parents or subsidiaries—are *not* considered alternate names. As noted above, each separate legal entity must have its own separately registered designation (though such separate designations may be managed by a single user through a single registration account).

Some commenters noted that it could be burdensome to list all of a service provider’s websites in the system.⁵² The Office does not believe that such a requirement is unduly onerous, especially when weighed against the benefits of allowing the public to search the directory using website names or addresses rather than the corporate names of service providers, which may not be well known. But to facilitate compliance with the

⁵¹ The Office declines to adopt the Recording Industry Association of America (“RIAA”)’s suggestion to require service providers to disclose any shareholders or related groups of shareholders with a majority ownership of the service provider and any persons or entities with a controlling interest in or decisionmaking power over the service provider. *See* RIAA Initial at 3; *see also* Google Reply at 2 (arguing that such a requirement has no basis in the statute). The Office does not at this time see sufficient justification to burden service providers with such an additional requirement.

⁵² *See, e.g.*, Public Knowledge Initial at 12-13 (“[T]he Copyright Office can require service providers to list their domain names as separate fields in the agent designation form. . . . 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.”); *see also* Microsoft Initial at 3-4; MPAA Initial at 11-12.

alternate names requirement, the system is designed to allow names to be uploaded in bulk using an Excel spreadsheet, in addition to being entered one at a time. Once entered or uploaded, the list can be modified as necessary to reflect new and/or discontinued names. These factors should significantly diminish any potential burden associated with providing alternate names.

Contact Information for the Service Provider. As under the interim regulations and proposed in the NPRM, the Office is continuing to require service providers to supply a physical mail address, pursuant to the Register's authority under section 512(c)(2) to require any additional contact information the Register deems appropriate. As under the interim regulations, a service provider's physical mail address will continue to be made public through the online directory and remains part of the information that a service provider is required to display on its website. Furthermore, as the NPRM proposed, the Office is requiring that the physical mail address be a street address, and not a post office box. The rationale for this requirement is that there are circumstances where it is important for a copyright owners to be able to physically locate the service provider (*e.g.*, for accurate identification of the service provider or to serve a legal notice).⁵³ Two commenters supported this aspect of the proposal,⁵⁴ and none objected.⁵⁵

⁵³ Although the Office is requiring a street address for the service provider, the Office declines to adopt RIAA's suggestion to require proof of this address. *See* RIAA Initial at 4. RIAA asserted that a significant problem facing copyright owners is that information provided by service providers is not accurate and the information cannot be used to locate the service provider to serve a subpoena. *Id.* While the Office is sympathetic to this concern, the Office believes that the new renewal requirement should largely resolve this issue.

⁵⁴ *See* MPAA Initial at 10; Google Initial at 2 (explaining that "all of" the NPRM's proposed clarifications concerning contact information for service providers "appear sound").

⁵⁵ Although some commenters argued in favor of permitting *designated agents* to provide a post office box in lieu of a street address, none objected to requiring *service providers* to provide a street address. *See, e.g.*, CCIA Initial at 1-2; ICC Initial at 6; Google Reply at 2. The Office notes that, in rare situations, the requirement to provide a street address could raise safety or security concerns for an individual who is operating the service. The final rule thus provides a mechanism to submit a written request for a waiver of

In addition, pursuant to the Register’s separate authority to issue regulations necessary to “maintain” the public directory, the Office is now also requiring service providers to provide a telephone number and email address, solely for use by the Office for administrative purposes essential to the functioning and continued usability of the registration system and directory—for example, to send system confirmations, renewal reminders, or other notices about its designation or the system itself.⁵⁶ A service provider’s telephone number and email address will not be shown in the public directory, and are not required to be displayed on the service provider’s website.

Agent’s Identity. Section 512(c)(2)(A) specifies that to invoke the limitation of liability provided under subsection (c), the service provider must provide “the name, address, phone number, and electronic mail address of the agent.” Under the interim regulations, the Office initially required the service provider to provide the name of a natural person to act as the service provider’s designated agent. As a result of concerns that personnel changes could inadvertently render the designation of a natural person obsolete, however, the Office has subsequently allowed service providers to designate a specific position or a particular title (*e.g.*, “Copyright Manager”), rather than an individually named person, as its agent.⁵⁷

the prohibition on post office boxes in exceptional circumstances. If the request is approved, the service provider may display the post office box address on its website and will receive instructions from the Office on how to complete the Office’s electronic registration process. Upon successful completion of the registration process in accordance with the Office’s instructions, the registered designation will not be considered invalid due to any failure to comply with the service provider address requirement, and the Office will override the system to insert the post office box as the service provider’s address.

⁵⁶ Though the NPRM only proposed requiring an email address, the Office is now requesting a telephone number as well as an alternative and more expedient method for the Office to communicate directly with service providers, if necessary.

⁵⁷ This expansion was a matter of internal practice as the interim rule has always required the “name of the agent.” *See* 37 CFR 201.38(c)(3).

The NPRM proposed continuation of the practice of allowing service providers to designate an agent either by name or by position or title.⁵⁸ The NPRM also stated, however, that the Office was not inclined to permit a service provider to designate an entity generally (*e.g.*, a law firm or copyright management agency).⁵⁹ The Office expressed concern that notices of claimed infringement addressed to a general entity, rather than a natural person or specific title, might be overlooked or not attended to in a timely fashion, and that this concern is reduced when a service provider designates a specific position or title at an entity or a natural person as its agent, particularly when that role is associated with a specific email address.⁶⁰ The NPRM further proposed, however, that service providers be permitted to designate an agent either within the service provider's organization itself or at an unrelated third party.⁶¹

There was widespread support among commenters for maintaining the Office's current practice of allowing service providers to designate agents by position or title rather than an individual's proper name, both to address the problem of personnel changes and to avoid misuse of personal information.⁶² Moreover, none of the commenters opposed the Office's position that an employee of either the service provider or a third party could serve as a designated agent.⁶³ There was debate, however,

⁵⁸ 76 FR at 59957.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* The NPRM also stated that the Office was not inclined to permit the designation of multiple agents, as doing so would unjustifiably complicate the statutory process. *Id.* All commenters seemed to agree with this. *See, e.g.*, MPAA Initial at 10; RIAA Initial at 3.

⁶² *See, e.g.*, Google Initial at 2; Microsoft Initial at 3; MPAA Initial at 9-10; Telecomm Parties Initial at 4. Only RIAA seemed to oppose this, suggesting that the best way to ensure notices reach live persons is to require that they be sent to an email address for which a particular employee has responsibility. RIAA Initial at 3.

⁶³ *Cf.* MPAA Initial at 10 (supporting concept of allowing service provider employees or third parties to serve as designated agents).

concerning whether it would be appropriate to name a third-party entity as a whole (*e.g.*, a law firm or copyright management agency) as an agent. One trade organization representing copyright owners was against it, arguing that it would increase the likelihood that notices are not handled expeditiously and further complicate the ability of rights holders to efficiently contact the individual responsible when there are failures to act on notices, to follow up on the handling of notices, or to take other action.⁶⁴ But Public Knowledge, a public advocacy organization, urged the Office to allow designation of third-party entities as a whole, noting that regardless of whether the designated agent is a person, title, or entity, it does not change the service provider's obligation to respond to notices expeditiously.⁶⁵ Public Knowledge further contended that section 512 does not limit designations to specifically identifiable persons, and that at least one federal court has suggested that designating an entire department as an agent satisfies the statute.⁶⁶

After considering the comments and reevaluating its initial inclination with respect to the naming of an individual or position versus a department or entity as a whole to serve as a designated agent, the Office has concluded that any one of these appears to be a reasonable interpretation of the statute. The Office believes, contrary to its initial inclination, that the sounder policy is to allow a service provider to designate as its agent an individual (*e.g.*, "Jane Doe"), a specific position or title held by an individual (*e.g.*, "Copyright Manager"), a specific department within the service provider's organization or within a third-party entity (*e.g.*, "Copyright Compliance Department"), or a third-party entity generally (*e.g.*, "ACME Takedown Service"). The Office agrees with

⁶⁴ MPAA Initial at 9.

⁶⁵ Public Knowledge Initial at 9-11.

⁶⁶ *Id.* at 9-10 (citing *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1092 n.13 (C.D. Cal. 2001)).

the point made by Public Knowledge that service providers are already obligated by statute to respond “expeditiously” to take down requests; this is true whether they rely on a particular individual, a corporate department, or a third-party entity to process their notices. The Office is also cognizant of the current realities of the notice-and-takedown system, where some large service providers now receive millions of takedown requests per day, making a requirement that a designated agent be a single person simply infeasible.⁶⁷ Indeed, the designation of a single person to receive all takedown requests for further processing by others would not allay the Office’s original concerns of overlooked notices and untimely action, but might well work *against* the efficient processing of such requests.⁶⁸

The Copyright Office emphasizes, however, that these changes to the rule are in no way intended to excuse the loss or mishandling of notices addressed to departments or entities rather than individuals, or to otherwise absolve service providers from their statutory responsibility to “respond[] expeditiously” to notices of claimed infringement.⁶⁹ Rather, it is the Office’s hope that by making these practical accommodations—which may be especially useful for service providers that receive large volumes of notices—the rule will in fact enable greater attention to notices and faster response times.

⁶⁷ See, e.g., Chris Welch, *Google received over 75 million copyright takedown requests in February*, VERGE (Mar. 7, 2016), <http://www.theverge.com/2016/3/7/11172516/google-takedown-requests-75-million> (stating that Google received over 75 million DMCA takedown requests in a single month and that “Google is effectively processing over 100,000 URLs per hour”).

⁶⁸ RIAA also urged the Office to require a service provider’s designated agent to accept service of process on behalf of the service provider. RIAA Initial at 3. Google opposed this, stating that RIAA’s request has no basis in the statute and is contrary to its purpose of providing an expeditious, nonjudicial way of removing infringing material. Google Reply at 1-2. The Office declines to adopt RIAA’s suggestion; requiring designated agents to accept service of process appears to go beyond the main purpose of the statute.

⁶⁹ See 17 U.S.C. 512(c)(1)(C).

Contact Information for the Designated Agent. In addition to the agent’s identity, the amended regulations continue to require a designated agent’s physical mail address, telephone number, and email address.⁷⁰ Section 512(c)(2)(A) requires this information to be supplied to the Copyright Office and also to appear on the service provider’s website. The interim rule’s requirement of a facsimile number, however, is being discontinued due to the fact that faxing has become a relatively obsolete technology.

Because an individual serving as a designated agent may be located outside of the service provider’s organization, the Office is now also requiring that the designated agent’s organization be identified, when applicable. If the designated agent is an individual, a position or title, or a department within a service provider, the agent’s organization would simply be the service provider. If the agent is an individual, position or title, or a department at a third-party entity, the agent’s organization would be the legal name of that third-party entity. If the agent is a third-party entity as a whole, then the name of the agent and the organization fields should have the same information. If the agent is an individual acting outside of the context of any organization, the field can be marked “None” or “N/A.”

The NPRM proposed permitting post office boxes to serve as a designated agent’s address due to concerns about agents’ privacy and safety, particularly where an agent’s

⁷⁰ *See id.* at 512(c)(2)(A). Microsoft requested that in addition to this basic information, the Office include an optional field in the online system to permit service providers to designate a particular website location linking to the service provider’s designated agent contact information or to additional information or online tools to use a service provider’s specific process for receiving notices of claimed infringement. Microsoft Initial at 3-4. While service providers have the option of suggesting the use of specific procedures on their website (in addition to providing contact information for a designated agent as required under section 512(c)(2)), the Office declines to adopt Microsoft’s suggestion at this time. The Office notes that no other commenter addressed this proposal, and the Office has insufficient information at this time to determine whether such a proposal should be adopted.

only address is a home address.⁷¹ A number of commenters echoed these concerns.⁷²

Others argued that the agent is a public-facing position and rightsholders need to be able to contact the agent directly to report claims of infringement, including by street address if telephone and email efforts prove insufficient.⁷³ They further claimed that using a post office box provides a layer of anonymity that is not warranted, and that requiring a street address better ensures that the agent is a real person and the information provided in the designation is reliable.⁷⁴

After weighing these conflicting viewpoints, the Office has determined that, consistent with the proposed rule, the final rule will allow a designated agent to specify a post office box and will not require a street address. Irrespective of the safety and privacy concerns of designated agents, requiring a physical street address is unnecessary to achieve the goals of the statute. To satisfy section 512(c)(2), service providers are required to supply accurate and reliable information for their designated agents, regardless of whether their agents are using a street address or post office box. While a post office box may not be as direct of a point of contact as a street address, copyright owners may still contact the designated agent by telephone or email. Moreover, allowing use of post office boxes may actually allow for faster and more efficient processing of mailed notices. For example, a large corporate mailroom receiving a broad mix of correspondence might be slower in identifying time-sensitive notices and delivering them

⁷¹ 76 FR at 59958.

⁷² *See, e.g.*, CCIA Initial at 1-2; ICC Initial at 6; Google Reply at 2.

⁷³ *See, e.g.*, MPAA Initial at 10; RIAA Initial at 4.

⁷⁴ *See, e.g.*, MPAA Initial at 10; RIAA Initial at 4. RIAA also asserted that where the agent is an individual with only a home address, the individual is either the sole owner of the service provider (in which case he or she must supply his or her physical address anyway as part of the service provider contact information) or an employee or consultant of a very small company with no central office. RIAA argued that in these situations, the need to supply a physical address will underscore the importance of responding to notices. RIAA Initial at 4.

to the responsible person within the organization. In contrast, a post office box could be dedicated solely to the receipt of DMCA takedown requests and could be checked directly by the agent.

Signature and Attestation. The Office has eliminated the signature requirement contained in the interim rule. Because all designations in the online registration system require the creation of a user account, as well as payment via Pay.gov (operated by the U.S. Department of the Treasury) with a credit or debit card or a bank account, the system reasonably verifies and authenticates the identity of the person designating the agent (or amending or resubmitting such designation). The registration system as designed by the Library requires each account to be protected by a twelve character password, and the Pay.gov system additionally requires a credit card or bank account holder name, if a credit or debit card, a billing address and card number, and if a bank account, the account and routing numbers.

Furthermore, in designating an agent, or amending or resubmitting such designation, the online registration system requires the account user to attest both to having the authority of the service provider to take that action and to the accuracy and completeness of the information being submitted to the Office by checking a box acknowledging the user's agreement to such an attestation. The transaction cannot be completed without such attestation.⁷⁵

C. DMCA Designated Agent Directory

The new registration system described is directly tied to the public, searchable DMCA designated agent directory. Information submitted by service providers through

⁷⁵ More generally, existing federal law prohibits the making of any “knowingly and willfully” “materially false, fictitious, or fraudulent statement[s] or representation[s].” 18 U.S.C. 1001(a).

the registration system will automatically populate in the directory, providing fast and efficient public access to designated agent information. Members of the public will be able to access the directory through the Office's website and can search the directory either by service provider name or alternate name to obtain contact information for a designated agent. The search results will show not only service provider names and alternate names matching the search query, but will also indicate whether the agent designation is still active.

Prior Versions of Electronic Designations. The NPRM asked for comment on whether earlier versions of electronic designations should be made available, free of charge, through the public online directory of designated agents, or whether those versions should instead be kept offline, and made available to the public only upon request to the Copyright Office.⁷⁶ Some commenters argued that listing prior versions of designations could create confusion for users as to which entry is current and might result in notifications being sent to the wrong person.⁷⁷ Others were concerned with the additional cost of developing this functionality.⁷⁸ On the other side, some commenters asserted that having immediate access to prior versions of designations would make it easier to determine whether a service provider qualified for safe harbor protection and might also assist scholars in certain research pursuits.⁷⁹ Some commenters also suggested that if prior versions are included, they be clearly marked as such or maintained in a separate part of the directory.⁸⁰

⁷⁶ 76 FR at 59954-55.

⁷⁷ See, e.g., ICC Initial at 4; MPAA Initial at 5-6.

⁷⁸ See, e.g., ICC Initial at 4; RIAA Initial at 2.

⁷⁹ See, e.g., Public Knowledge Initial at 8-9; RIAA Initial at 2; see also Microsoft Initial at 3.

⁸⁰ See, e.g., MPAA Initial at 5-6; Public Knowledge Initial at 8-9.

Having weighed these comments, the Office has decided to make prior versions of electronic designations available in the online directory so that the public can access them immediately and free of charge. At present, the Office plans for the directory to contain prior versions going back for up to ten years. Each time a designation is amended or resubmitted, the system creates a new version of the designation. Additionally, new versions are created whenever a designation, after having expired or been terminated, is reactivated. Because the earlier records are automatically maintained by the system, there is little added cost to the Office to permit users to access this information. Such historical information may be useful, for example, in a litigation or research context.

In addition, the Office has designed the directory layout to clearly indicate whether a designation is currently active or historical, and any results from a search of the directory will initially only display the most recent version of a designation. From there, a user can then navigate to prior versions of that designation. Accordingly, there should be little confusion about the status of a particular designation. The anticipated ten-year time frame was selected due to concerns that displaying more than ten years of records could become voluminous and contain large amounts of outdated information that is simply irrelevant for the vast majority of users.⁸¹ Electronic designations filed before that ten-year period will be maintained consistent with the Office's record retention policies, and would be made available via a request for copies of records pursuant to 37 CFR 201.2.

Prior Versions of Paper Designations. For the same reasons just discussed, following the transition from the current paper-generated directory to the new electronically-generated directory (see "Phaseout of Paper Directory and Requirement to

⁸¹ The design of the system is sufficiently flexible that the ten-year period can be increased in the future if there is sufficient demand for older records.

Register in Electronic Directory” below), the Office plans to continue to make the paper-generated directory available on the Office’s website for ten years following the conclusion of the transition period. After this time, paper designations filed pursuant to the interim regulations will be maintained consistent with the Office’s record retention policies, and made available via a request for copies of records pursuant to 37 CFR 201.2.

D. Amending and Renewing a Designation

Amending a Designation. It is prudent for service providers to keep the information in their designations, both on their websites and with the Office, current and accurate, as courts may find that inaccurate or outdated information constitutes a failure to comply with the statutory requirements necessary for invoking the limitations on liability in section 512. The new online registration system permits a service provider to review the accuracy and currency of the information in its designation and to amend the designation at any time. The fee for amending a designation will initially be set at \$6 (see “Fees” below). Upon successful receipt of payment, the system will confirm, both in the system and via email, that the designation has been updated in the public directory, and has therefore been renewed as of that date (see “Periodic Renewal of Designations” below).

Periodic Renewal of Designations. As discussed above (see “Background”), the Office has found that an extremely high number of designations in the current directory appear to contain inaccurate or outdated information, or are for defunct service providers. In order to help maintain the accuracy and utility of the online directory of designated agents made available to the public, and to ensure that service providers do not inadvertently lose the protections of the section 512 safe harbors, the NPRM proposed

requiring service providers to periodically review their designations and, as necessary, update them to correct inaccurate or outdated information, or confirm their continued accuracy by resubmitting them through the online system.⁸² Under the proposed rule, the renewal period was two years.⁸³ The NPRM also proposed that the online registration system would send out reminder emails ahead of the renewal deadline and explained how that process might work.⁸⁴ Lastly, the NPRM proposed that a failure to renew would result in the expiration of the designation.⁸⁵

A number of commenters opposed the requirement of periodic renewal.⁸⁶ Opponents offered several arguments for this position. They argued that once a service provider initially makes a valid designation, that designation should remain effective unless and until it is amended by the service provider.⁸⁷ Opponents claimed that a renewal requirement is contrary to the statute because section 512 does not require service providers to take any further action so long as their designations remain accurate and up to date, and the Register is only authorized to specify additional contact information required for new designations—not to impose additional requirements on previously registered designations.⁸⁸ They argued that the statute already motivates service providers to keep their designations current and accurate because failing to do so can result in a loss of safe harbor eligibility independent of compliance or noncompliance

⁸² 76 FR at 59954-55.

⁸³ *Id.* at 59959.

⁸⁴ *Id.* at 59955.

⁸⁵ *Id.* at 59955.

⁸⁶ *See, e.g.*, CCIA Initial at 2-6; CCIA Fee at 2-7; EFF Initial at 1-3; EFF Fee at 2-5; IA Fee at 2-4; Microsoft Initial at 2-3; MPAA Initial at 4-5; Neco Initial at 1; Public Knowledge Initial at 4-8.

⁸⁷ *See, e.g.*, EFF Initial at 1; EFF Fee at 2; Neco Initial at 1.

⁸⁸ *See, e.g.*, CCIA Initial at 3-5; CCIA Fee at 2-3; IA Fee at 3; Public Knowledge Initial at 4-8.

with any Copyright Office-imposed renewal requirement.⁸⁹ They further stated that such situations should be adjudicated in court, and that the Office should not categorically strip service providers of safe harbor eligibility for failing to renew their designations.⁹⁰

Opponents also complained that the proposed renewal requirement was an unreasonable burden, especially on smaller service providers.⁹¹ Opponents further argued that the potential loss of safe harbor protection would be a disproportionately severe consequence for a failure to renew, especially when the failure was due to inattention or clerical error rather than purposeful conduct.⁹² They opined that, even with an emailed reminder, a service provider might inadvertently fail to renew its designation and should not be punished for doing so.⁹³

On the other side, trade associations representing both copyright owners and a coalition of large internet companies, including broadband providers and technology companies like Amazon, eBay and Google, agreed with the NPRM that renewal is important to address the issue of stale information and ensure the continued accuracy of the directory.⁹⁴ These associations also agreed that two years is an appropriate time frame for the requirement.⁹⁵ Furthermore, the Department of Commerce's Internet Policy Task

⁸⁹ See, e.g., CCIA Initial at 3-5; CCIA Fee at 5; EFF Initial at 3; Microsoft Initial at 2-3; MPAA Initial at 4-5; Public Knowledge Initial at 4-8.

⁹⁰ See, e.g., EFF Initial at 3; Public Knowledge Initial at 8.

⁹¹ See, e.g., CCIA Fee at 3-4; EFF Initial at 2-3; EFF Fee at 4; MPAA Initial at 4-5; Neco Initial at 1; Public Knowledge Initial at 5, 7-8; IA Fee at 3.

⁹² See, e.g., CCIA Initial at 5; EFF Initial at 2; EFF Fee at 3; IA Fee at 3.

⁹³ See, e.g., Neco Initial at 1.

⁹⁴ ICC Initial at 3-4; RIAA Initial at 2; *see also* Verizon Initial at 1.

⁹⁵ ICC Initial at 3-4; RIAA Initial at 2.

Force examined this aspect of the Office’s proposal and expressed no objection to it; indeed, it stated that it “support[ed] the Copyright Office’s efforts.”⁹⁶

Having considered the competing views of stakeholders concerning the renewal requirement—as well as its own research into the accuracy of the listings under the existing paper system without a renewal requirement—the Office concludes that in order to “maintain a current directory” of designated agents, as the Register is obligated to do under section 512(c)(2), the Office should adopt a periodic renewal requirement. That said, in view of the concerns expressed by some regarding the burden of renewal—particularly with respect to smaller entities—the Office believes it is reasonable to extend the renewal period from two years to three.

A service provider may fulfill the periodic renewal requirement by reviewing its existing designation and either amending it to correct or update information or, if the information is still accurate and no changes are necessary, simply resubmitting it through the online system without amendment—a process that should take no more than a few minutes.⁹⁷ The fee to amend or resubmit a designation in connection with the renewal requirement will initially be set at \$6 (see “Fees” below).

The final rule also makes clear that the three-year renewal period will be reset after a service provider either amends or resubmits its designation through the online system. To illustrate, if a service provider registers a new designation on January 1, 2017, and thereafter makes no amendment to that designation, it must renew the designation

⁹⁶ DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 59 (2013).

⁹⁷ The Office declines to adopt the suggestion of the Motion Picture Association of America (“MPAA”) that an account user managing multiple designations be allowed to renew all of them simultaneously without having to review each designation individually. *See* MPAA Initial at 5. The purpose of renewal is to require a service provider that has not reviewed or updated its designation during the previous three-year period to examine the designation to make sure it is still correct. MPAA’s suggestion would be contrary to that goal.

prior to January 1, 2020. But if that service provider instead amends its initial designation on March 1, 2019 to update it with new information, the three-year renewal clock is reset, and March 1, 2022 becomes the date prior to which the service provider must renew the designation.

To alleviate any concern that a service provider may accidentally forget to renew its designation during the three-year period, the online registration system will automatically generate a series of reminder emails well in advance of the renewal deadline to every email address associated with the service provider in the system (including the primary and secondary account contacts, the service provider, and the designated agent).

Should a service provider fail to renew within the allotted time, the designation will expire and become invalid, resulting in its being labeled as “terminated” in the directory. The primary and secondary account contacts, service provider, and designated agent will be notified of this. A service provider whose designation has expired, however, will be able to reactivate the expired designation by logging into the system and following the same process as a renewal (including payment of the applicable fee). Once the process is complete and payment has been successfully received, the designation will no longer be invalid and will be relabeled as “active” in the directory. Reactivation of a designation will create a new version of the designation in the historical record (see “Prior Versions of Electronic Designations” above). Thus, the directory will show a gap in time between expiration and reactivation, during which the service provider had no active designated agent listed in the Office’s directory.

The Copyright Office finds the arguments made against the renewal requirement unpersuasive. First, imposition of a renewal requirement is within the authority delegated to the Office by the Copyright Act. Section 512(c)(2) not only requires service providers to maintain up-to-date information, but explicitly obligates the Register of Copyrights to “maintain a *current* directory of agents available to the public.”⁹⁸ The Register’s obligation to maintain a “current directory” exists separate and apart from the obligations placed on service providers themselves.⁹⁹ Accordingly, the Register has the authority to issue rules designed to ensure that the directory remains “current.”¹⁰⁰

Second, contrary to opponents’ arguments, relying on service providers’ general statutory obligation to maintain accurate designations is an inadequate means of ensuring the directory remains current. For instance, the Office’s interim regulations have long obligated service providers to affirmatively notify the Office when they terminate operations.¹⁰¹ But, as discussed above, this obligation is not often satisfied. Moreover, as also discussed above, even as to service providers that remain in business, a significant number of designations in the existing directory are out of date or inaccurate.¹⁰²

⁹⁸ See 17 U.S.C. 512(c)(2) (emphasis added).

⁹⁹ Indeed, an opponent of the renewal requirement, the Computer and Communications Industry Association (“CCIA”), acknowledged that Congress assigned the burden of maintaining a “current” directory to the Register. See CCIA Initial at 4.

¹⁰⁰ See 17 U.S.C. 702 (authorizing the Register to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title”).

¹⁰¹ See 37 CFR 201.38(g).

¹⁰² In the Fee NPRM, the Office estimated—for the purposes of the fee calculation—that 75% to 85% of designations in the current directory were for active service providers. 81 FR at 33154. In responding to that proposal, one commenter implied that this estimate militates against requiring periodic renewal of designations or mandatory electronic submission of previously filed paper designations, stating that “the Office itself concedes in the NPRM that the current registrations are generally accurate.” See CCIA Fee at 5. This logic is mistaken. First, it is sufficiently problematic if as many as 25% of the designations currently in the system (*i.e.*, approximately 5,825 designations) are for service providers that are no longer in business. Second, the estimate made in the Fee NPRM does not account for the high number of inaccurate or outdated designations filed by service providers that are still in business (as previously noted above).

One commenter stated that the presence of designations by defunct service providers is harmless because the public will not be searching for them.¹⁰³ But there are many cases where this would not be true. For instance, as discussed in the “Conflicting Designations” section below, where one service provider is purchased by or merges with another service provider and fails to terminate its designation in the Copyright Office’s directory, there could be conflicting information in the directory (*e.g.*, duplicate entries referencing web properties that were transferred in the sale) absent some regular process to clear out inactive designations. Similar confusion could result if a defunct domain name is purchased by another entity, who then files a conflicting designation in the system. In any event, the commenter’s critique ignores the high prevalence of noncompliant designations for service providers that continue to be in business.

Third, with respect to the burden imposed and severity of the consequences for the failure to renew, opponents’ arguments are significantly overstated. Renewal—which will initially cost a mere \$6, take minutes to complete, and need only be attended to when information has changed or once every three years—should be a manageable proposition for even the smallest of service providers. Nor does the rule create “a trap for the unwary” as some opponents allege;¹⁰⁴ as explained above, the system is designed to send a series of reminders to all email addresses associated with a service provider, including its designated agent. If, after those multiple reminders, a service provider fails to renew its designation, it can hardly be said to have let its designation lapse unwittingly. In addition, given that service providers already routinely manage an array of other recurring

The periodic renewal and mandatory electronic submission requirements are aimed at mitigating that problem as well.

¹⁰³ See CCIA Initial at 2-3; CCIA Fee at 6.

¹⁰⁴ See, *e.g.*, CCIA Initial at 5; CCIA Fee at 3; MPAA Initial at 4-5

obligations that are integral to their businesses—including business licenses,¹⁰⁵ software licenses,¹⁰⁶ trademarks,¹⁰⁷ web hosting,¹⁰⁸ leases on web domain names,¹⁰⁹ real estate leases, and insurance policies—the Office cannot see how such a renewal requirement could be viewed as excessively burdensome. At the same time, such a requirement carries significant benefits both for the public and for the service providers themselves, by ensuring that up-to-date information is maintained in the system, and that information from defunct service providers is cleared out of the system.¹¹⁰

Indeed, while opponents highlight the consequences of failing to comply with the renewal requirement, the fact is that opponents' preferred solution—which would rely on service providers to remember to update their information with the Copyright Office—is *more* likely to lead to negative consequences. Under the current regime, a service provider (particularly a smaller or less sophisticated one) might file its designation with the Copyright Office once, and easily forget to amend the designation as its information

¹⁰⁵ See, e.g., *New Business Registration*, S.F. TREASURER & TAX COLLECTOR, <http://sftreasurer.org/registration> (last visited Oct. 12, 2016) (San Francisco requires renewal every year); *Business License Frequently Asked Questions*, L.A. COUNTY TREASURER & TAX COLLECTOR, https://ttc.lacounty.gov/proptax/Business_License_FAQ.htm (last visited Oct. 12, 2016) (Los Angeles requires renewal every year); *Frequently Asked Questions: Business Licensing*, DEP'T OF CONSUMER & REG. AFF., <http://dcra.dc.gov/node/545242> (last visited Oct. 12, 2016) (District of Columbia requires renewal every two years).

¹⁰⁶ See, e.g., *Comparison of Creative Cloud Plans*, ADOBE, <https://creative.adobe.com/plans> (last visited Oct. 12, 2016) (requiring monthly or annual renewal).

¹⁰⁷ See 15 U.S.C. 1059(a) (requiring renewal every ten years).

¹⁰⁸ See, e.g., *List of Web Hosting Plans*, GODADDY, https://www.godaddy.com/hosting/web-hosting-config-new.aspx?src=gs&plan=plesk_tier1_036mo (last visited Oct. 12, 2016) (requiring renewal between every three and thirty-six months depending on plan).

¹⁰⁹ See, e.g., *FAQs*, ICANN, <https://www.icann.org/resources/pages/faqs-2014-01-21-en> (last visited Oct. 12, 2016) (leases on web domain names may need to be renewed as often as every year, and at minimum must be renewed every ten years).

¹¹⁰ The renewal requirement is nothing like the copyright formalities referenced by commenters. See, e.g., CCIA Initial at 5; CCIA Fee at 6-7. Renewal is necessary to maintain a current and accurate directory and should in many cases actually assist service providers in retaining their safe harbor, rather than serving to deprive them of it.

changes, sometimes years later.¹¹¹ As a trade association opposing the renewal requirement correctly observed, a “failure to comply with the existing requirements [of section 512] results in the loss of service providers’ safe harbor.”¹¹² That is not a better result for service providers.¹¹³

E. Phaseout of Paper Directory and Requirement to Register in Electronic Directory

As of the effective date of this rule, the Office will no longer accept paper designations and amendments; service providers must use the online system to submit designations. Furthermore, service providers that have previously designated agents with the Office under the interim regulations must submit new designations through the electronic system. The final rule gives service providers a generous period—until December 31, 2017—to register their designations in the online system. Previously filed paper designations will continue to be effective until the service provider has registered using the new online system or through December 31, 2017, whichever is earlier.

As discussed above (see “Prior Versions of Paper Designations” above), the Office will continue to maintain the old paper-generated directory on its website during the transition period and for ten years following it, in addition to the new electronically-generated directory. During the 13-month transition period—that is, through December 31, 2017—members of the public will need to search both directories for designated

¹¹¹ As to any argument that the system should only generate reminder notices, the Office believes that requiring service providers to actively review and either amend or resubmit their information is much more likely to lead to current and accurate information in the directory. In addition, simply sending out reminders would not help clear out defunct service providers from the system.

¹¹² CCIA Fee at 5.

¹¹³ At the same time, the Office emphasizes that if a service provider’s designated agent information changes within the three-year period before renewal is required, a service provider that wishes to remain compliant should promptly submit amended information to the Office (in addition to updating its website).

agent information, since a service provider may have a valid designation in either. To the extent there is a discrepancy between designations registered in the old and new systems, the information in the new directory will control. As of January 1, 2018, all paper designations will become invalid and only those designations made through the online registration system will satisfy the statutory requirement for designating an agent with the Copyright Office.

The Office is requiring service providers who have previously filed a paper designation to register in the electronic system for two principal reasons. First, as discussed above, the old paper-generated directory contains a significant amount of outdated information, including information about service providers that no longer exist. The electronic submission requirement will encourage service providers that have neglected to update their designations to provide updated information as necessary. Second, for the Office to migrate information from the old directory into the new directory would require extensive manual review and data entry, an effort that would be extraordinarily burdensome and expensive for the Office to undertake. The old directory consists of approximately 23,300 designations, all in PDF format. It would be a significant drain on the Copyright Office's limited resources to have Office personnel manually transfer information from the PDFs into the new database.¹¹⁴ And, after all of this effort, the end result would be a new electronic database full of obsolete and erroneous records.

¹¹⁴ Some commenters asked the Office to explore technological means of transferring data from the old directory automatically into the new one. *See, e.g.*, MPAA Initial at 3; Public Knowledge Initial at 6. The paper designations, however, are not all in the same format, and some have been filled out by hand. In any event, as explained, even assuming that information could be easily transferred into the new directory, there remains the underlying problem concerning the significant amount of outdated information in the old directory.

The arguments made by commenters opposed to the requirement to re-register in the electronic system were essentially the same as those made by commenters opposed to renewals: it is burdensome, it is a trap for the unwary, it imposes potentially harsh consequences for noncompliance, and the Office lacks authority to implement it.¹¹⁵ But, as the, the Office made clear in its interim regulations in 1998 that “[i]nterim designations filed pursuant to these interim regulations will be valid until the effective date of the final regulations. At that time, service providers wishing to invoke section 512(c)(2) will have to file new designations that satisfy the requirements of the final regulations, which will include the payment of the fee required under the final regulations.”¹¹⁶ Therefore, it was always understood that there would be a requirement to re-register upon the adoption of a final rule. Moreover, as noted, requiring electronic registration is an effective means of ensuring that the Copyright Office can fulfill its statutory duty of maintaining a “current” directory of designated agents. It is not a trap for the unwary; service providers will have over a year to submit their designations through the online process. In addition, the Office plans to engage in public outreach activities to ensure that service providers are aware of the new system and the electronic submission requirement.¹¹⁷

F. Fees

¹¹⁵ See, e.g., CCIA Initial at 2-5; EFF Initial at 2-3; MPAA Initial at 3; Public Knowledge Initial at 3-7.

¹¹⁶ 63 FR at 59234.

¹¹⁷ Again, the Department of Commerce’s Internet Policy Task Force expressed no objection to this aspect of the Office’s proposal, and instead stated that it “support[ed] the Copyright Office’s efforts.”

DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 59 (2013).

In keeping with the specific fee-setting authority in section 512(c)(2), the NPRM proposed establishing fees to designate agents.¹¹⁸ It also proposed continuing to charge additional fees for alternate names.¹¹⁹ Following the NPRM, the Office issued the Fee NPRM, which proposed reducing the current registration fee from \$105 (plus an additional fee of \$35 for each group of one to ten alternate names used by the service provider), to a flat fee of \$6 per designation—whether registering a new designation, or amending or resubmitting a previously registered designation.¹²⁰ The Fee NPRM explained that the old fee reflected the cost to the Office of receiving, reviewing, scanning, and posting the paper designations submitted by service providers, which has been a largely manual process.¹²¹ The Office believed that based on an analysis of the cost of operating and maintaining the new electronic system, the fee to designate an agent to receive a notification of claimed infringement could be much lower, and should be established at \$6 per designation.¹²² The Office believed that an additional fee to include alternate names with a designation was not warranted because the Office did not foresee appreciable additional costs due to service provider submission of alternate names through the online process.¹²³ The Office explained that the significantly lower proposed fee reflected the far greater efficiency of the electronic system for the Copyright Office.¹²⁴

¹¹⁸ See 76 FR at 59956.

¹¹⁹ *Id.*

¹²⁰ 81 FR at 33154.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

Although some comments filed in response to the NPRM argued against imposition of any fee, or for the imposition of a reduced fee, in certain cases,¹²⁵ those particular points were not renewed in response to the Fee NPRM, likely due to the modesty of the fee adopted.¹²⁶ Significantly, no commenter specifically argued against setting the fee at \$6.¹²⁷ In any event, the Office sees no reason to provide reduced fees or no fees for renewals, amendments, or resubmissions, which would result in needing to charge higher fees for initial designations in the new system. The Office declines to structure the fee this way, as it is fairer to impose the ongoing costs of the system on those service providers that continue to use the system, rather than requiring a higher upfront fee regardless of how long a service provider maintains a designation. Therefore, pursuant to the Register’s authority under sections 512(c)(2) and 708(a) of title 17,¹²⁸ and for the reasons described in the Fee NPRM, the Office adopts the \$6 fee as originally proposed.

G. Miscellaneous Issues

¹²⁵ Some commenters argued that charging *any* fee for amendments would discourage timely updates to designations. *See, e.g.*, MPAA Initial at 6-7; RIAA Initial at 2; Telecomm Parties Initial at 5. Others argued that no fee should be assessed for renewals or that fees for renewals should be less than for an initial designation. *See, e.g.*, ICC Initial at 3-4; Verizon Initial at 1. Still others asserted that no fee should be assessed for electronic submission of designations contained in the old paper-generated directory. *See, e.g.*, Public Knowledge Initial at 6-7.

¹²⁶ Many of the arguments regarding the fee made in response to the Fee NPRM were simply vehicles to contest the requirement that service providers must re-register electronically and periodically renew their designations. *See* CCIA Fee at 2-7; EFF Fee at 2-5; IA Fee at 2-4. These arguments have been addressed. *See* “Periodic Renewal of Designations” and “Phaseout of Paper Directory and Requirement to Register in Electronic Directory” above.

¹²⁷ The Office declines to adopt EFF’s proposals to offer an option for service providers to make single one-time registration to remain permanently effective and to restructure the fee so that the same revenue can be collected without the renewal requirement. *See* EFF Fee at 2, 5. Permitting either of these would defeat the purpose of the renewal requirement, which is to ensure a current and accurate directory—not to generate funds for the Office beyond its costs. If the Office had determined that renewal was unnecessary, the fee would have been adjusted accordingly.

¹²⁸ *See* 17 U.S.C. 512(c)(2) (authorizing the Register of Copyrights to “require payment of a fee by service providers to cover the costs” of maintaining a directory of agents designated to receive notifications of claimed infringement); *id.* 708(a) (more generally authorizing the Register to fix fees for Office services based on the cost of providing the service).

Conflicting Designations. As discussed in the NPRM, there is a potential concern with duplicative entries in the directory that can arise when a service provider transfers one of the websites it controls to another company, but fails to update its designation to remove that website from the list of alternate names.¹²⁹ As a result, when the purchasing company registers or updates its designation with the Office and lists the purchased website as an alternate name, there may be conflicting entries in the public directory associated with that alternate name—one pointing to the seller’s designation and the other pointing to the purchaser’s designation. A similar problem can occur when a service provider itself is acquired, and the acquired service provider’s designation is not terminated, either because the acquired service provider has no incentive to do so itself, or because the purchasing entity does not have access to the acquired service provider’s designated agent registration account. These scenarios can create confusion if copyright owners find two different agents identified in the directory for the same website or same service provider.

The NPRM proposed two potential solutions to this problem.¹³⁰ The first option was to simply allow both designations to exist in the online directory until expiration of the renewal period of the old designation; at that time, the old designation would either expire or be updated with accurate information. In the meantime, people seeking the identity of and contact information for a service provider’s agent could find two inconsistent listings for the service provider’s designated agent. The NPRM suggested that users could cover themselves by serving a notice of claimed infringement on both the old and the new designated agent. The second option was to include, as part of the final

¹²⁹ 76 FR at 59955-56.

¹³⁰ *Id.*

rule, a requirement that the seller, who has control of the existing entry in the online registration system, amend the designation or terminate it as appropriate. Commenters offered competing ideas for how best to resolve the issue of conflicting designations.¹³¹ Having weighed these comments, the Office concludes that it should not impose any requirements on a buyer or seller to update or terminate the prior designation. The Office sees no good way to enforce such a requirement, and remains disinclined to involve itself in policing the system for conflicting entries. As noted above, the Office also believes that the concern about conflicting entries is mitigated by the periodic renewal requirement, as the outdated designations will be updated or expire after three years. But to help minimize conflicting entries, the Office has designed the system to warn a registration account user if he or she attempts to register a designation for a service provider with the same name as a service provider that has already been registered in the system. The system will not, however, bar the creation of the new designation, as it is possible for two service providers to legitimately have the same name.

Purported Abuse of the DMCA Notice-and-Takedown System. Some commenters requested that the Office use this opportunity to take specific steps to address various alleged “ongoing abuses” of the DMCA notice-and-takedown system by copyright owners, such as where it is used (1) in connection with peer-to-peer file sharing activities where the material alleged to be infringed does not reside on a service provider’s system or network, (2) in connection with trademark infringement, where the process does not

¹³¹ See, e.g., Microsoft Initial at 3 (supporting requiring either the seller or buyer to amend the existing designation or replace it with a new designation); MPAA Initial at 7 (opposing imposing a requirement on sellers or buyers, noting the lack of an enforcement mechanism); ICC Initial at 5 (urging that any concern is mitigated by the renewal requirement, and that sending notices to two agents in the meantime is not a significant inconvenience for copyright owners); RIAA Initial at 2 (suggesting that the system be designed to inform service providers of conflicting designations).

apply, (3) in situations where material is protected by fair use, and (4) as an abusive litigation tactic in “copyright troll” lawsuits.¹³² They noted that such misuse significantly burdens service providers, making it more difficult to respond to legitimate notices and slowing down that process.¹³³ They specifically asked that the Office present users of the online directory with a prominent warning and informational notice describing proper use of the notice-and-takedown process, warning against improper use, and alerting users to the potential penalties under section 512(f) for making material misrepresentations.¹³⁴

The Office believes that this rulemaking and the online directory are not the proper forums to attempt to police rights holders who send improper notices or otherwise misuse the process. The Office notes that in fact, such issues are among those currently being reviewed in the Office’s pending study of section 512.¹³⁵ The Office has, however, included information on the front page of the system describing the statutorily required elements for notices.

Clarity and Readability Edits. In addition to adjustments to the NPRM’s proposed regulatory language reflecting the foregoing conclusions, the Copyright Office has made additional non-substantive modifications for purposes of clarity and readability.

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulations

For the reasons set forth above, the Copyright Office amends 37 CFR part 201 as follows:

¹³² See, e.g., ICC Initial at 7-8; Verizon Initial at 2.

¹³³ See, e.g., ICC Initial at 7-8; Verizon Initial at 2.

¹³⁴ See, e.g., ICC Initial at 7-8; Verizon Initial at 2.

¹³⁵ See Section 512 Study: Notice and Request for Public Comment, 80 FR 81862 (Dec. 31, 2015).

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.3 by revising paragraph (c)(17) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

Registration, recordation and related services	Fees
	(\$)
* * * * *	
(17) Designation of agent under 17 U.S.C. 512(c)(2) to receive notification of claimed infringement, or amendment or resubmission of designation	6
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3. Revise § 201.38 to read as follows:

§ 201.38 Designation of agent to receive notification of claimed infringement.

(a) *General.* This section prescribes the rules pursuant to which service providers may designate agents to receive notifications of claimed infringement pursuant to section 512 of title 17 of the United States Code. Any service provider seeking to comply with section 512(c)(2) of the statute must:

(1) Designate an agent by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, the service provider and designated agent information required by paragraph (b) of this section;

(2) Maintain the currency and accuracy of the information required by paragraph (b) both on its website and with the Office by timely updating such information when it has changed; and

(3) Comply with the electronic registration requirements in paragraph (c) to designate an agent with the Office.

(b) *Information required to designate an agent.* To designate an agent, a service provider must make available through its service, including on its website in a location accessible to the public, and provide to the Copyright Office in accordance with paragraph (c) of this section, the following information:

(1)(i) The full legal name and physical street address of the service provider. Related or affiliated service providers that are separate legal entities (*e.g.*, corporate parents and subsidiaries) are considered separate service providers, and each must have its own separate designation.

(ii) A post office box may not be substituted for the street address for the service provider, except in exceptional circumstances (*e.g.*, where there is a demonstrable threat to an individual's personal safety or security, such that it may be dangerous to publicly publish a street address where such individual can be located) and, upon written request by the service provider, the Register of Copyrights determines that the circumstances warrant a waiver of this requirement. To obtain a waiver, the service provider must send

a signed letter, addressed to the “U.S. Copyright Office, Office of the General Counsel” and sent to the address for time-sensitive requests set forth in section 201.1(c)(1), containing the following information: the name of the service provider; the post office box address that the service provider wishes to use; a detailed statement providing the reasons supporting the request, with explanation of the specific threat(s) to an individual’s personal safety or security; and an email address and/or physical mail address for any responsive correspondence from the Office. There is no fee associated with making this request. If the request is approved, the service provider may display the post office box address on its website and will receive instructions from the Office as to how to complete the Office’s electronic registration process.

(2) All alternate names that the public would be likely to use to search for the service provider’s designated agent in the Copyright Office’s online directory of designated agents, including all names under which the service provider is doing business, website names and addresses (*i.e.*, URLs), software application names, and other commonly used names. Separate legal entities are not considered alternate names.

(3) The name of the agent designated to receive notifications of claimed infringement and, if applicable, the name of the agent’s organization. The designated agent may be an individual (*e.g.*, “Jane Doe”), a specific position or title held by an individual (*e.g.*, “Copyright Manager”), a specific department within the service provider’s organization or within a third-party entity (*e.g.*, “Copyright Compliance Department”), or a third-party entity generally (*e.g.*, “ACME Takedown Service”). Only a single agent may be designated for each service provider.

(4) The physical mail address (street address or post office box), telephone number, and email address of the agent designated to receive notifications of claimed infringement.

(c) *Electronic registration with the Copyright Office.* Service providers designating an agent with the Copyright Office must do so electronically by establishing an account with and then utilizing the applicable online registration system made available through the Copyright Office's website. Designations, amendments, and resubmissions submitted to the Office in paper or any other form will not be accepted. All electronic registrations must adhere to the following requirements:

(1) *Registration information.* All required fields in the online registration system must be completed in order for the designation to be registered with the Copyright Office. In addition to the information required by paragraph (b) of this section, the person designating the agent with the Office must provide the following for administrative purposes, and which will not be displayed in the Office's public directory and need not be displayed by the service provider on its website:

(i) The first name, last name, position or title, organization, physical mail address (street address or post office box), telephone number, and email address of two representatives of the service provider who will serve as primary and secondary points of contact for communications with the Office.

(ii) A telephone number and email address for the service provider for communications with the Office.

(2) *Attestation.* For each designation and any subsequent amendment or resubmission of such designation, the person designating the agent, or amending or resubmitting such designation, must attest that:

(i) The information provided to the Office is true, accurate, and complete to the best of his or her knowledge; and

(ii) He or she has been given authority to make the designation, amendment, or resubmission on behalf of the service provider.

(3) *Amendment.* All service providers must ensure the currency and accuracy of the information contained in designations submitted to the Office by timely updating information when it has changed. A service provider may amend a designation previously registered with the Office at any time to correct or update information.

(4) *Periodic renewal.* A service provider's designation will expire and become invalid three years after it is registered with the Office, unless the service provider renews such designation by either amending it to correct or update information or resubmitting it without amendment. Either amending or resubmitting a designation, as appropriate, begins a new three-year period before such designation must be renewed.

(d) *Fees.* The Copyright Office's general fee schedule, located at section 201.3 of title 37 of the Code of Federal Regulations, sets forth the applicable fee for a service provider to designate an agent with the Copyright Office to receive notifications of claimed infringement and to amend or resubmit such a designation.

(e) *Transitional provisions.* (1) As of December 1, 2016, any designation of an agent pursuant to 17 U.S.C. 512(c)(2) must be made electronically through the Copyright Office's online registration system.

(2) A service provider that has designated an agent with the Office under the previous version of this section, which was effective between November 3, 1998 and November 30, 2016, and desires to remain in compliance with section 512(c)(2) of title 17, United States Code, must submit a new designation electronically using the online registration system by December 31, 2017. Any designation not made through the online registration system will expire and become invalid after December 31, 2017.

(3) During the period beginning with the effective date of this section, December 1, 2016, through December 31, 2017 (the “transition period”), the Copyright Office will maintain two directories of designated agents: the directory consisting of paper designations made pursuant to the prior interim regulations (the “old directory”), and the directory consisting of designations made electronically through the online registration system (the “new directory”). During the transition period, a compliant designation in either the old directory or the new directory will satisfy the service provider’s obligation under section 512(c)(2) of title 17, United States Code to designate an agent with the Copyright Office.

Dated: October 26, 2016.

Karyn Temple Claggett,
*Acting Register of Copyrights and
Director of the U.S. Copyright Office*

Approved by:

Carla D. Hayden,
Librarian of Congress

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