Before the
Library of Congress
Copyright Office

Designation of Agent To Receive Notification of Claimed Infringement	)	**Docket No. RM 2011-6**

COMMENTS

OF

THE INTERNET COMMERCE COALITION

Jim Halpert, General Counsel
500 8th Street, NW
Washington, DC 20004

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Comments of the Internet Commerce Coalition

I. INTRODUCTION

The Internet Commerce Coalition ("ICC") appreciates the opportunity to comment on the proposed revisions to the interim rules governing § 512(c) agent designations.

The ICC's members include leading Internet and e-commerce companies and trade associations: Amazon.com, AOL, AT&T, CareerBuilder, Comcast, eBay, Google, Monster.com, Time Warner Cable, Verizon, NCTA, Tech America and US Telecomm. Our organization was formed from the common experience of working together on the DMCA, and the idea of *notice-and–take-down* was actually developed by several ICC members.

The DMCA remains very important to our members and all use the Copyright Office's agent designation process. Our members use it regularly and have a thorough understanding of the strengths and weaknesses of the Interim Rules.

II. SUMMARY

We strongly agree with the NPRM's preliminary conclusions: (1) that it is important to automate the registration process; (2) to allow listing the designated agent's job title and a email address for the position, rather than requiring listing the individual's name and individual email

address; and (3) that public posting of prior agent designations is a needless expense and risks confusing less sophisticated rights owners so that they send DMCA notices to the wrong address.

While we agree with the NPRM's decision to allow registrations for subsidiary service providers in a single filing, we strongly urge the Copyright Office to allow registrations of affiliated entities regardless of whether the affiliates share the same physical street address. This would avoid needless clerical work without in any way compromising the integrity of the registration process.

Finally, we urge the Copyright Office to post a prominent notice at the entry point to the database warning entities submitting DMCA notices that knowing material misrepresentations in 512(c) notices may trigger monetary liability. Service providers receive large volumes of notices framed misleadingly as 512(c) take down notices that have nothing to do with copyright infringement, do not relate to content that a service provider can take down, or are materially insufficient (e.g., failing the provide adequate information to locate the material subject to take-down).

III. IMPROVING THE DMCA DESIGNATED AGENT REGISTRATION PROCESS

A. Electronic Filing Would Be a Significant Efficiency Gain, but Issues Raised by Changes in Personnel Who Registered Accounts May Require Further Elaboration

The ICC strongly supports the Copyright Office's initiative to automate the agent registration process. The current system is slow and inefficient, and, as noted in the NPRM, contains stale information.

To address the issue of stale information, we agree that it makes sense to require periodic registration renewals; although the fee for doing so should be lower than the fee for an original registration, as the statute does not require validation and there should be no financial

disincentive to file updates. Verification every two years strikes us as an appropriate period to prune stale registrations.

As the NPRM recognizes, the person who registers may no longer be working for the service provider two years later. For this reason, the NPRM correctly suggests requiring submission of two email addresses, one for the person who registers, the other an email address for the service provider. This is critically important because the turnover among people who submit agent registrations is significant.

Furthermore, to the extent that the Copyright Office wishes to implement some sort of authentication measure for verifications, it should be sure to specify that the password for the account also be sent to the service provider's main address, and should provide for a password recovery feature.

B. Maintaining Archived Versions of Registrations so that They are Available for Use in Litigation Is an Inappropriate Expense

As the NPRM notes, maintaining a public listing in the database of prior 512(c)agent designations when the same information is available from the Copyright Office provides minimal benefits, risks confusing rights owners as to the current address or online business names of the service provider, and would increase expense with minimal benefit.

In fact, the evidentiary value of the content of prior notifications is minimal and not worth building a special capability in order to put this information online. Minor inaccuracies in registrations are legally irrelevant. The express language of the § 512 makes clear that immaterial inaccuracies or missing information in registrations do not disqualify a registration. Service providers are required to file "*substantially* the following information: (A) name, address, phone number, and electronic mail address of the agent, and (B) other contact

information" specified by the Copyright Office. 17 U.S.C. § 512(c)(2)(A) and (B) (emphasis added). Thus, the actual content of a registration is unlikely to be relevant. Instead, whether a registration was filed at all is what is most relevant. Moreover, to be eligible for § 512(c) protection, service providers must provide agent designations on their websites, and the particulars of a service provider's registration with the Copyright Office rarely figures in litigation.

Thus, the risk of rights owners referencing an old registration and the costs of adding this feature far outweigh its value.

C. Overlapping Designations Should Be Addressed through the Biennial Re-Validation Requirement

The suggestion that a selling website owner be required to update its designation (76 Fed. Reg. at 59956) is likely not to work for much the same reason that requiring service providers who go out of business to update their designations hasn't worked – neither entity benefits from correcting the registration. The better solution is to solve the issue of dual registration through the biennial validation requirement. Alternatively, the acquiring entity, on submitting proof of the acquisition of the registered business, could expunge the old registration. In any event, the "inconvenience" of sending a DMCA notice to two designated agents is not significant.

D. Registrations Should Be Streamlined to Allow Companies to Register Multiple Affiliated Websites at the Same Time Regardless of their Addresses

We strongly support the proposal for a single, joint designation of 512(c) agents to receive DMCA notices, as this is far more efficient and reduces pointless clerical work that in no way advances the interests embodied in Section 512. However, limiting the registration to other affiliated service providers "that share[] the same physical street address" with the service

provider, *see* Proposed § 201.38(c)(1), would be a waste of resources. We urge the Copyright Office to correct this in the final rules.

The current requirement that each affiliate separately register its 512(c) agents wastes hours of time for companies that have large numbers of online affiliated entities. Provided that the correct street addresses are submitted for affiliated entities and some proof of affiliation is submitted, there is no valid reason to limit registration to affiliates sharing the same street address.

Of course, we understand that entities that register many sites or services make greater use of the database, and have no objection to a higher fee being charged for companies that register large numbers of sites. However, a change in the physical address, agent name or alternative site names, should be addressed through a simple update of the registration as to the site or sites in question and should not require severing. (76 Fed. Reg. 59958).

E. Agent Designations Should be Required to List Only a P.O. Box and Generic Email Address

We appreciate the Copyright Office's concern for the privacy of individuals who serve as designated agents. One woman who works as a designated agent for one of our member companies has received harassing "stalking-type" messages from people who are not copyright owners, but found her name through an agent designation. For precisely this sort of reason, it is important to allow email addresses of designated agents to reflect their function, rather than their name, and to allow designated agents to list P.O. Boxes as their address, wherever their address is a home address. *See* 76 Fed. Reg. at 59958.

F. The Copyright Office Should Post a Prominent Warning Against Material Misrepresentations in 512(c) Notices

Finally, the ICC urges the Copyright Office to include a prominent warning at the entry page to the database warning people submitting notifications of claimed infringement that knowing material misrepresentations in § 512(c) notices can trigger liability for harm caused by the notice. This warning is necessary because notices are currently being submitted based upon allegedly infringing acts or for purposes that do not fall under the notice and take down provisions of the DMCA, resulting in an abuse of the Designated Agent process and causing significant administrative burdens on Internet Service Providers.

For example, notices based upon allegations of trademark infringement are invalid under the DMCA. Likewise, notices of copyright infringement protected by the "Fair Use" defense under the Copyright Act, such as commentary, criticism, news reporting, research, teaching, library archiving and scholarship, sent in such circumstances are invalid. *See* 17 U.S.C. § 107. Further, the Designated Agent process is being used in conjunction with copyright troll/"John Doe" lawsuits where the named plaintiff(s) use the questionable tactic of using Designated Agent information to obtain discovery from Internet Service Providers demanding the personal information of subscribers. The plaintiffs usually serve the named Internet Service Provider with a list or lists of hundreds of subscriber IP addresses that have allegedly been used to engage in copyright infringement. The DMCA does not provide for such use of the Designated Agent information.

Finally, with respect to notices related Peer-to-Peer ("P2P") and other file sharing activities, the "notice and takedown" provisions of the DMCA do not apply to material which does not reside on a service provider's system or network – for example, where a service provider acts merely as a conduit, as in the case of P2P and other file sharing activities on an end

user's computer connected to the Internet by an Internet access service. Notices sent in such circumstances are invalid. *See* 17 U.S.C. §§ 512(a); 512(c)(3)(A)(iii); and *Recording Industry Association of America, Inc. v. Verizon Internet Services Inc.*, 351 F.3d 1229 (cert. denied 2004 U.S. Lexis 6701, October 12, 2004) (confirming that takedown notices do not apply when a service provider is acting only as a conduit providing Internet access, as in P2P).

We thank you for considering our views and would be happy to meet with you to answer any questions you may have regarding these comments or the issues raised in this rulemaking.

Sincerely,

Jim Halpert, General Counsel
(202) 799-4441