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Copyright Office Establishes New Electronic DMCA Agent Registration

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Service Providers Must Re-register Online to Maintain Safe Harbor Protection

A service provider seeking to take advantage of certain of the safe harbors under the Digital Millennium Copyright Act (DMCA) is required to designate an agent to receive takedown notices. The service provider is required to post the DMCA agent's contact information on its website *and* to provide such information to the Copyright Office. On November 1, 2016, the U.S. Copyright Office, pursuant to its authority under 17 U.S.C. §512(c)(2), issued a final rule (codified at 37 C.F.R. § 201.38)establishing a new electronic system to designate agents to receive takedown notifications under the DMCA. **Service providers that previously designated an agent with the Copyright Office via a paper filing will have until December 31, 2017 to submit new registrations through the electronic system or lose their safe harbor protection**. It is extremely important that all service providers who rely on DMCA safe harbors are aware of, and comply with the requirements of, this new rule.

The new rule became effective on December 1, 2016, the date that the new online DMCA agent registration system and directory was launched, replacing the paper-based system implemented through the interim regulations adopted in 1998. As of December 1, 2016, the Office will no longer accept paper designations of DMCA designated agents.

Why is this important to service providers that have already registered?

As part of the transition to the new electronic system, the Office's old directory of designated agents generated from paper filings will be phased out on December 31, 2017.

As such, any service provider that has previously designated an agent with the Office will have a 13-month grace period to submit a new designation electronically through the new online registration system. And, importantly, under the new rule, service providers must renew their agent designations every three years. Like it or not, all providers will have to go through the new registrations process and take the time to reexamine the accuracy of their filings, particularly when it comes to providers with multiple subsidiaries or domains.

The good news is that the government filing fees around registrations of designated agents has decreased dramatically. While the previous fee was $105 per registration, under the new system, the fee is $6 the registration of a designated agent for up to ten domains.

Actions to Take:

- **Double Check Designated Agent Information on Your Website:** A service provider that fails to maintain accurate information, both on its site and with the Copyright Office, risks losing the safe harbor on a procedural technicality. (See e.g., *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 Web site and the [Copyright Office] directory) in order for that provider to be shielded by the § 512(c) safe harbor'')). This transition presents a good opportunity for service providers to review their DMCA agent designations, and their DMCA procedures in general, to ensure the availability of the DMCA safe harbors in the future.
- **Create an Electronic Account and Register Service Providers**: To designate an agent with the Copyright Office, an entity must first create a DMCA Designated Agent Registration Account that will be used to log into the system and input the required information. The Copyright Office permits a service provider to hire a third party to manage its designation on its behalf, so long as the service provider understands that it risks losing the safe harbor protections if the third party fails to provide accurate, up-to-information.

Register Providers: 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 similar information as the original paper filings. Note, the rule requires that service providers also include all alternate names that the public are likely to associate with the service provider (e.g., website names and addresses, software application names, d/b/a names). Also, in a significant clarification from the past (and a change in the way many have interpreted registration requirements in the past), the rule states that related companies that are separate legal entities, such as a parent and subsidiary, are considered separate service providers that must be registered separately.).

- **Designate an Agent**: The law requires that the service provider must provide "the name, address, phone number, and electronic mail address of the agent." As noted in the rule, 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., an entity's law firm or a DMCA takedown service company).
- **Renew Every Three Years**: While the filing fee has dropped dramatically, a service provider's designation will expire three years after it is registered, unless the service provider renews it by either amending it to update information or resubmitting it within the deadline. Under the rule, either amending or resubmitting a designation begins a new three-year period before such designation must be renewed again.

While the new changes introduce a modernized DMCA registration system that boasts updated information and lower filing fees, the new system creates additional administration tasks (which some critics have categorized as needless or a trap for the unwary) – requiring existing providers that have previously registered and relied on the DMCA safe harbor for years to now affirmatively re-register and thereafter renew their registration every three years to maintain their safe harbor status.

This alert delineates the main actions that service providers must take in the next year to maintain their safe harbor status. The rule contains some additional details that have to be followed during registration. We urge service providers to take care to follow the new online DMCA agent designation procedures to avoid losing important legal protections.

Related Professionals

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