

New DMCA Rule: Service Providers Must Re-register to Qualify for Safe Harbor Protection

November 7, 2016

The Copyright Office is imposing new registration requirements on service providers in order to maintain their safe harbor protection under the Digital Millennium Copyright Act ("DMCA"). The new rule, effective as of December 1, requires all service providers – even those that have already filed with the Copyright Office – to *electronically* register an agent to receive notices of copyright infringement under the DMCA. The electronic filing scheme replaces the current paper filing system, and failure to re-register electronically by December 31, 2017 will disqualify a service provider from the DMCA's safe harbor protection.

The new rule

The new rule will require a service provider to provide the following information (some of which is new) in an online form:

1. Its full legal name and physical street address. The new rule also prohibits designation of a PO Box as a service provider's street address except in "exceptional circumstances" and with a waiver from the Register of Copyrights;
2. All alternate names that the public would be likely to use to search for the service provider's agent in the Copyright Office's online directory, including all names under which the service provider is doing business, website names and address (i.e., URLs), software application names, and other commonly used names;
3. The designated agent's legal name; specific position or title (if an individual); the specific department within the service provider's organization or within a third-party entity; or the name of a third-party entity; and
4. The designated agent's mailing address (which may be a street address or PO Box), telephone number and email address.

Not only must service providers that are currently in compliance re-register electronically by the end of 2017, but they also will need to re-register every three years thereafter, even if the information has not changed. The Copyright Office says that a simple form will be available for such purposes, and the cost of filing will be \$6.

Inadvertent loss of safe harbor protection

These new requirements may result in many service providers inadvertently losing protection under the DMCA safe harbor, which protects service providers from monetary liability for infringing content posted by users or other third parties. Some service providers will fail to re-register. Others may fail to include newly-required information, such as including all names that the public would "be likely to use" to search for the service provider. The new rule has been criticized by commentators and may be challenged in court. In anticipation of such a challenge, the Copyright Office has prospectively sought to justify and defend the new rule, citing to substantial outdated information in the current Copyright Office directory.

Next steps

Assuming the new rule takes effect, all service providers should plan to re-register electronically by next year and every three years thereafter. We recommend contacting your copyright counsel to ensure that you don't inadvertently lose the valuable protections of the DMCA safe harbor.

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