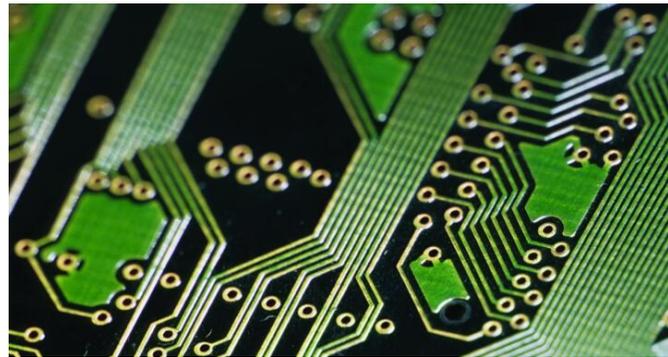


# Website Owners, Mobile Application Providers, and Other Online Service Providers BEWARE

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## Failure to Comply with New DMCA Eligibility Requirements May Result in Copyright Infringement Liability

Any company that allows third-party users to post or link content to its website, mobile applications, or other online platforms must understand and comply with the new Digital Millennium Copyright Act ("DMCA") safe harbor requirements or risk liability for copyright infringement attributable to postings and links made on its platform by

third parties.

Every day online service providers ("OSPs") such as e-commerce retail sites, news outlets, social media sites, and mobile application providers receive, copy, store, display, and distribute vast quantities of electronic material on behalf of their customers and users, all without control over, or knowledge of, the content of that material.

The availability of such services is imperative for both personal and business use of the Internet, but, unfortunately, it also enhances the ease of unauthorized (i.e., infringing) uses of copyrighted works. Without the protections of the DMCA, the legal liability and risk for such unauthorized and infringing content appearing on and residing in an OSP's networks and systems is borne by the OSP.

### Digital Millennium Copyright Act Safe Harbors

Since 1998, the DMCA has provided OSPs with important protections and limitations ("safe harbors") against copyright infringement liability attributable to a third-party user's posting and/or storage of infringing material on a system or network operated by the OSP. However, for these safe harbors to apply, the OSP must meet certain conditions of eligibility.

Specifically, all OSPs must:

- Adopt and implement a policy of terminating repeat infringers;
- Accommodate, and not interfere with, standard technical measures used by copyright owners to protect copyrighted works;
- Not have actual knowledge of the infringement, or awareness of facts and circumstances making the infringement apparent;

- Act expeditiously to remove or disable access to the infringing material once actual knowledge or awareness is gained;
- Not receive any direct financial benefit from the infringement; and,
- Have designated an agent to receive notifications of claimed copyright infringement.

Under the recent DMCA revisions, the required agent designation information will remain the same, but how a DMCA agent is designated and maintained to qualify for the safe harbors will change effective December 1, 2016.

### **DMCA Agent Designation Changes**

A valid agent designation requires the OSP to post certain identification and contact information on its website, mobile application, or other service platform. This information must be posted in a location accessible to the public, and the OSP must also file the same agent information with the United States Copyright Office along with the required filing fees.

Until now, the submission of an agent designation to the Copyright Office was done by filling out a one-page paper form and mailing or emailing it to the Copyright Office with the required filing fees. Once designated, unless the agent information needed to be updated, there were no renewal or re-designation requirements.

However, as of December 1, 2016, the Copyright Office is scrapping the old paper forms and launching a new fully electronic system for designating agents. All OSPs desiring to qualify (or maintain qualification) for the DMCA safe harbors must submit their agent designations and associated fees online at the Copyright Office's website and renew or re-designate the DMCA agent every three years or risk losing the safe harbor protections. Agent designations previously submitted under the old paper system will not be valid after December 31, 2017, and must be resubmitted under the new electronic system.

### **DMCA Traps for the Unwary**

- OSPs must meet all of the DMCA conditions of eligibility to qualify for protection under the DMCA safe harbors. Unfamiliarity or attempted compliance with the DMCA will not be sufficient to shield OSPs from copyright liability.
- All agent designations filed and processed before December 1, 2016 (that is, under the old paper-based system), will only be valid until December 31, 2017. Thus, all OSPs who properly designated their agents under the old system will have until December 31, 2017 to refile their agent designations using the new electronic system. Any OSP that fails to refile will lose eligibility for the DMCA safe harbor protections on January 1, 2018.
- An OSP must ensure that its agent designation is up-to-date on its website, mobile application, or other platform, and with the Copyright Office.
- An agent designation under the new electronic system must be renewed every three years or it will expire and no longer be valid. The Copyright Office has stated an intention to issue automated notifications under the new system to remind an OSP when it is time to renew its electronic agent designation, but renewal, and risk, is ultimately the OSP's responsibility.

### **Conclusion**

The eligibility requirements to qualify for the DMCA safe harbors are changing. An OSP that allows third-party users to post content to its websites, mobile applications, or other online platforms should review its compliance with the DMCA criteria generally and specifically its existing copyright agent designations.

It is likely many OSPs are, or soon will be, ineligible for DMCA safe harbor protections; don't be one.

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