


WATCH TOWER
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January 24, 2019

Hon. Cathy Seibel
United States District Court
United States Courthouse
300 Quarropas Street, Chambers 533
White Plains, NY 10601-4150

Re: *In Re DMCA Subpoena to Facebook, Inc.*, Case No. 7:18-mc-00471-CS
Pre-Motion Conference Request

Dear Judge Seibel:

I represent Watch Tower Bible and Tract Society of Pennsylvania (“Watch Tower”) in connection with the above-referenced matter. Watch Tower respectfully submits this letter pursuant to Rule 2.A of the Court’s Individual Rules of Practice. We kindly request a pre-motion conference in connection with an anticipated Motion for Contempt. This letter sets forth the basis for the motion.

This matter stems from the alleged infringement of several copyrighted works owned by Watch Tower on the Facebook website. The Facebook user at issue posted artwork and photographs owned by Watch Tower. To make matters worse, these copyrighted works were posted by the Facebook user before Watch Tower released them.

As the owner of the infringed works, Watch Tower is entitled to seek redress from the court for what it, in good faith, believes is an infringement of its works. *See* 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed . . .”). In order for Watch Tower to seek judicial redress in such an action, it must know the identity of the individual responsible for the infringement. Indeed, “[a]scertaining the identities and residences of [anonymous] defendants is critical to plaintiffs’ ability to pursue litigation, for without this information, plaintiffs will be unable to serve process.” *Sony Music Entm’t, Inc. v. Doe*, 326 F. Supp. 2d. 556, 566 (S.D.N.Y. 2004).

On October 8, 2018, Watch Tower sent a DMCA-compliant copyright infringement notice to Facebook’s designated DMCA agent. Having sent the DMCA Notice, Watch Tower was also entitled to “request the clerk of any United States district court to issue a subpoena to [the] service provider for identification of [the] alleged infringer.” 17 U.S.C. § 512(h)(1).

On October 15, 2018, Watch Tower applied to this Court for such a subpoena seeking identifying information for the Facebook user that posted the infringing works on the Facebook

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site. Having reviewed the evidence submitted in support of Watch Tower's application for a DMCA Subpoena, this Court concluded that Watch Tower is entitled to discover the true identity of the infringing Facebook user, and granted Watch Tower's request for a subpoena. The DMCA Subpoena was served on Facebook via its registered agent – Corporation Service Company – on October 24, 2018. It provided a return date of November 30, 2018.

As a service provider subject to the DMCA, once Facebook was served with a DMCA Subpoena demanding the "identification of an alleged infringer", Facebook was required to "expeditiously disclose to the copyright owner . . . the information required by the subpoena, *notwithstanding any other provision of law.*" 17 U.S.C. § 512(h)(1); 17 U.S.C. § 512(h)(5)(emphasis added). However, Facebook never responded to the subpoena or complied with the subpoena.

On December 3, Watch Tower wrote to Facebook at its Menlo Park office regarding its failure to respond to the subpoena. Watch Tower requested a Meet and Confer in an effort to avoid seeking court intervention. Neither Facebook nor its counsel responded to Watch Tower's letter. On December 26, 2018, Watch Tower wrote to Facebook again requesting a Meet and Confer. Facebook did not respond to this letter. On January 9, 2018, Watch Tower wrote to Facebook for a third time requesting to meet and confer regarding Facebook's failure to respond or comply with the subpoena. Still, Facebook did not respond to Watch Tower's letter.

It has now been over three months since Watch Tower served a properly-issued DMCA Subpoena on Facebook. Facebook's complete disregard of this Court's order forces Watch Tower to seek the Court's intervention. Watch Tower anticipates the need to file a Motion for Contempt pursuant to Fed. R. Civ. P. 45(g).

"The Court has the power under this rule to impose contempt simply on the basis of failure to comply with a subpoena." *Diamond v. Simon*, 89 Civ. 7061 (PKL), 1994 WL 10622, at *1 (S.D.N.Y. Jan. 10, 1994); *see PaineWebber Inc. v. Acstar Ins. Co.*, 211 F.R.D. 247, 249 (S.D.N.Y. 2002)(holding a non-party that neither objected to subpoena nor complied in civil contempt); *see Forum Ins. Co. v. Keller*, No. 91 Civ. 4528 (JFK), 1992 WL 297580, *3 (S.D.N.Y. Oct. 8, 1992)(holding nonparty in contempt and assessing sanctions of \$1000.00 for failure to comply with document subpoena).

Watch Tower is not interested in seeking draconian sanctions. Watch Tower simply wants Facebook to comply with its obligation as a service provider subject to the DMCA. Without Facebook's compliance with its DMCA obligations, Watch Tower is effectively prevented from pursuing a copyright infringement claim against the infringer because it cannot serve a summons and complaint without the infringer's identifying information.

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Since Facebook has not responded to the DMCA Subpoena or Watch Tower's letters, there is a real threat that Facebook has not undertaken to preserve the subpoenaed information. Service providers typically retain user activity logs containing the information sought for a limited period of time. Once that user data is deleted, there is no other means of identifying the user who posted the infringing material. *See Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) ("expedited discovery is necessary to prevent the requested data from being lost forever as part of routine deletions by the ISPs.")

Watch Tower's anticipated Motion for Contempt will petition this Court to: 1) direct Facebook to produce the documents sought by the DMCA Subpoena immediately, or at such later time as the Court may direct; 2) sanction Facebook in an amount to be set by this Court for each day after the determined compliance deadline that Facebook fails to comply with this Court's order; and 3) for such other and further relief as this Court may deem just and proper.

Very truly yours,



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c:

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