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July 12, 2021

Via ECF

Hon. Judge Cathy Seibel
United States District Court
Southern District of New York
300 Quarropas Street
White Plains, NY 10601-4150

> Re: *Watch Tower Bible and Tract Society of Pennsylvania v. John Doe aka "Kevin McFree,"* No. 7:21-cv-04155
> Request for a Conference

Dear Hon. Judge Seibel:

We represent Plaintiff Watch Tower Bible and Tract Society of Pennsylvania in the above-referenced action. We write to update the Court on the status of Plaintiff's attempts to serve Defendant John Doe aka "Kevin McFree" and to request a conference with the Court to determine the best way for the case to proceed.

Plaintiff commenced this civil action on or about May 10, 2021, based on Defendant's infringement of Plaintiff's copyrights in four audiovisual works (the "WT Videos"). Defendant obtained purloined copies of Plaintiff's then-unpublished WT Videos and copied and posted significant portions of those works on his public YouTube account (the "Infringing Video").

The true identity and physical address of Defendant are not presently known to Plaintiff. The Infringing Video and YouTube account associated therewith identify Defendant only by the pseudonym "Kevin McFree" and do not provide any physical address. The account does identify Defendant's email address as <kevinmcfree@gmail.com>.

Plaintiff has made diligent efforts to determine Defendant's identity and address. Prior to commencing the instant litigation, on or about June 20, 2018, Plaintiff applied for and the Clerk of this Court issued to Google, Inc. ("Google") (the owner of YouTube) a subpoena pursuant to the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h) (the "DMCA Subpoena"). The DMCA Subpoena seeks the name, address, telephone number, email address and IP (internet protocol) address associated with the Infringing Video. Compl. ¶ 27 & Ex. H.

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On or about August 22, 2018, Defendant, via pro bono counsel and without identifying himself, sought a pre-motion conference with Hon. Judge Nelson S. Román of this Court concerning Defendant's desire to move to quash the DMCA Subpoena and to proceed anonymously. *See* Case No. 7:18-mc-00268, Dkt. # 6. The parties completed their pre-motion conference letters on or about August 27, 2018. *See id.*, Dkt. # 7.

Approximately two years later, on or about August 27, 2020, Hon. Judge Román issued an order allowing Defendant the opportunity to seek leave to move to quash the subpoena. *See id.*, Dkt. # 11. The parties completed their briefing on that motion on or about November 10, 2020. *Id.*, Dkt. ## 17-24. The motion currently is pending before Hon. Judge Román.

In Defendant's briefing on the motion, he claims he is "British citizen residing in the United Kingdom." *Id.*, Dkt. #22, ¶ 10. Thus, the 90 day deadline to serve under Fed. R. Civ P. 4(m) does not appear to apply.

YouTube has refused to comply with the DMCA Subpoena, including providing the name of Defendant, pending determination of the motion to quash.

Shortly after Plaintiff commenced the instant litigation, counsel for Plaintiff corresponded with pro bono counsel who represents Defendant in connection with the motion to quash (1) to determine whether pro bono counsel also represents Defendant in the instant infringement action and (2) to request pro bono counsel or Defendant waive service pursuant to Fed. R. Civ. P. 4(d). In response, pro bono counsel informed Plaintiff's counsel that he had conferred with Defendant, that he does not represent Defendant in the instant litigation, that he is not authorized to waive or to accept service and that Defendant would not disclose his identity.

The undersigned counsel for Plaintiff then emailed Defendant directly at the email address provided on his YouTube account, <kevinmcfree@gmail.com>, requesting that Defendant waive service. Defendant responded via email, refusing to waive service unless Plaintiff agreed to request a stay in the instant litigation, a position Plaintiff is under no obligation to take and that would result in even further delay and prejudice to Plaintiff. The undersigned counsel again emailed Defendant noting that Plaintiff could not accept such terms and reiterating Plaintiff's request that Defendant waive service. Defendant did not respond to that email.

Because Plaintiff already has filed a motion to quash the DMCA Subpoena issued in the miscellaneous action, Plaintiff has not sought leave in the instant action to serve an additional subpoena on Google, who also provides the email services associated with Defendant's Gmail address. Indeed, since Google already has stated it will not provide any identifying information concerning Defendant pending the determination of the motion to quash the DMCA Subpoena, it would be futile for Plaintiff to seek and serve an additional subpoena on Google.

Despite Plaintiff's requests and further inquiries, the Clerk of the Court will not issue a summons to Defendant in the name or John Doe or in his fictitious name "Kevin McFree." The

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Clerk has informed Plaintiff that the Court will only issue a summons to Defendant once his true name is known.

Plaintiff believes it has strong grounds to request the Court allow service on Defendant via email and would like to file a motion therefor. However, even if the Court grants a motion to allow service via email, because the Clerk will not issue a summons in the name of John Doe or in the fictitious name "Kevin McFree," Plaintiff will have no summons to serve.

Plaintiff thus requests a conference with the Court to determine the best way for the case to proceed, including to "secure the just [and] speedy" determination of the instant action in accordance with Fed. R. Civ. P. 1.

Respectfully submitted,

s/ Eric J. Shimanoff

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