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September 8, 2009

By Hand

Hon. Donald C. Pogue
Judge
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Re: John Wiley & Sons, Inc. v. Kirtsaeng
08 Civ. 7834 (DCP)

Dear Judge Pogue:

We are attorneys for plaintiff in the above action. As we discussed during the telephone conference on September 1, 2009, we are writing to address (i) the right to a jury trial on the issue of statutory damages, and (ii) the notice to Bank of America of the April 27, 2009 order.

I.

The jury should determine the issue of plaintiff's entitlement to statutory damages, as well as the amount of those statutory damages. Defendant demanded a trial by jury in his answer docketed December 2, 2008. The Seventh Amendment grants defendant that right. Feltner V. Columbia Pictures Television, Inc., 523 U.S. 340, 355, 118 S. Ct. 1279, 1288 (1998)("[W]e hold that the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.") Plaintiff has proceeded with the action in reliance on that jury demand, and would not consent to its withdrawal.

II.

The Bank of America had adequate notice of the April 27, 2009, order on April 27, 2009. The April 27, 2009 order tracks the language of Rule 65(d), and provides:

> "ORDERED that, pursuant to Rules 64 and 65 of the Federal Rules of Civil Procedures and New York CPLR §§ 6201 and 6210, pending the hearing on Wiley's application for an order of prejudgment attachment, it is hereby ordered that the funds of Kirtsaeng at PayPal, Inc., Bank of America and M&T Bank be, and hereby are, attached and Kirtsaeng, his agents, servants, employees, and attorneys and all persons in active concert or participation with them who receive actual notice of this order, be, and hereby are, enjoined from transferring or withdrawing any funds from those accounts pending further order of the Court." (Emphasis added.)

The notice required under this Rule need not be the same type of formal notice that is necessary to provide notice of a lawsuit. In re Lennon, 166 U.S. 548, 554, 17 S. Ct. 658, 660 (1897)("To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."); Vuitton et Fils S. A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir. 1979) ("This Rule codifies the long settled principle that personal service of an injunction is not required so long as those whom the plaintiff seeks to hold in contempt had actual notice of the decree."); Radio Corp. of America v. Cable Radio Tube Corp., 66 F.2d 778, 782 (2d Cir. 1933)("It is well settled that a party is liable in contempt for disobedience of an injunction of which he has notice, even though it has not been served upon him.") If a plaintiff provided notice in a sufficient manner to provide notice of the commencement of a civil action, then a fortiori the plaintiff has provided notice of the injunction.

Here, plaintiff provided Bank of America with notice that would have been sufficient to provide notice of

the commencement of the civil action. Rule 4(h) of the Federal Rules of Civil Procedure states:

> "(h) Serving a Corporation, Partnership, or Association.
>
> Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:...
>
> (b) By delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and - if the agent is one authorized by statute and the statute so requires - by also mailing a copy of each to the defendant;" (Emphasis added.)

The representative of Bank of America that plaintiff served on April 27, 2009 was "an agent authorized by appointment . . . to receive service of process." See the declaration of Laura Scileppi dated September 8, 2009. At a minimum, there is a question of fact as to that issue. (I had told Your Honor during our telephone conference on September 1, 2009 that we had served an officer of Bank of America, and that was incorrect.)

The question of whether Bank of America received notice of the injunction is distinct from the issues of (i) whether Bank of America acted in active concert with defendant in allowing him to withdraw the funds, (ii) whether Bank of America acted with a sufficient intent to be held liable for contempt, and (iii) whether sanctions against Bank of America are unnecessary if sanctions against defendant can remedy the harm plaintiff sustained.

Respectfully yours,

William Dunnegan

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Cc: Sam P. Israel, Esq.