UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAILIN ARENA and PATRICIA MCWILLIAM, Plaintiffs, vs. JOHN DOE and GOOGLE, INC., Defendants.	Case No.: 2:2012-cv-00778

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LIMITED EXPEDITED DISCOVERY, TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST JOHN DOE

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

FEDERAL STATUTES

OTHER SOURCES

INTRODUCTION

Plaintiffs Patricia McWilliam and Cailin Arena, pursuant to Rules 65 and 26(d) of the Federal Rules of Civil Procedure, respectfully move for: (1) a temporary restraining order and preliminary injunction to enjoin an unknown individual's ("John Doe's") continued online publication of their Copyrighted Materials[1]; and (2) limited, expedited discovery to identify John Doe. As described below, Plaintiffs have a substantial likelihood of success on the merits of their copyright infringement claims, will suffer ongoing irreparable harm in the absence of an injunction, and the balance of harms and the public interest also strongly favor an injunction. Additionally, expedited discovery should be granted so that John Doe can be identified before electronic evidence concerning his identity becomes unavailable.

FACTS

Plaintiffs are two American women in their 20s who moved abroad temporarily to teach English to foreign grade school students in Korea and Japan. *See* Arena Declaration, ¶ 2; McWilliam Declaration, ¶ 2. As described in more detail in the attached declarations, defendant John Doe is an unknown individual who has engaged in repeated acts of online harassment, cyber stalking, and racist and offensive rants directed towards the women. Arena Decl, ¶¶ 3-19; McWilliam Decl., ¶¶ 5-12. His actions include emailing one of the women, her boss and her business associates sexually explicit, racist and disturbing messages, and creating a sexually-explicit website regarding her. Arena Decl., *id*.

In addition, John Doe has taken entire pages of the women's photographs and creative writing and republished that copyrighted content on his own website, without the women's authorization. *Id*. at ¶ 12, 13, 29; McWilliam Decl., ¶ 7, 20. He has created a website entitled

[1] As defined herein, "Copyrighted Materials" refers to the copyrighted materials that are the subject of Plaintiffs' copyright applications with the U.S. Copyright Office, application Serial Nos. 1-720315798, 1-720315865, and 1-724213741.

"Korean Dating Bloggers" (he is apparently angry the women have dated Korean men) which displays screenshots of copyrighted materials (photographs and entire pages of creative writing) owned by Plaintiffs. *Id*. Despite the women's best efforts to identify him, the identity of John Doe is currently unknown. Arena Decl., ¶ 32; McWilliam, ¶ 4.

A. John Doe's History of Cyber Stalking and Harassing the Plaintiffs

John Doe's acts of cyber stalking and harassment of Ms. Arena, from January 3, 2012 to the present, are described in more detail in the attached declaration. *See* Arena Decl.,¶¶ 3-19. They can be summarized as follows:

- John Doe sent an anonymous email to Ms. Arena's boss through her company website. This email contained links to content that was sexual in nature and stated that Ms. Arena was the author of the content. *Id*. at ¶ 6.

- John Doe sent Ms. Arena a message through her company website stating: "You are ugly. Sorry to say but you're an ugly brown something. You probably also smell bad. Have fun in Japan, I hear the radiation isn't bad in Fukushima. Why not buy some vegetables from there for you and your ugly brown children." *See* Exhibit 1 to Arena Decl. *Id*. at ¶ 7.

- John Doe created a user account at an online, public forum associated with Ms. Arena's employment. Ms. Arena's business associates all read and access this online forum. John Doe posted a thread including statements that Ms. Arena was engaging in sexual relationships with members of other races, and implored viewers to visit links to Ms. Arena's company website and contact her directly about her conduct. *Id*. at ¶ 9.

- John Doe created a website entitled "Korean Dating Bloggers," at http://secretlivessexbloggers.blogspot.com (the "Korean Dating Bloggers" website) and associated the website with the name "Cailin Arena." John Doe also used Ms. Arena's name as a "website tag" for the blog so that it came up prominently in search results for the name "Cailin Arena." The website includes hateful commentary, identifies Ms. Arena's work email address and location, and suggests that Ms. Arena is promiscuous. It indicates that John Doe has been secretly following Ms. Arena's online activities for at least a year. *Id*. at ¶ 6.

- John Doe created a Tumblr account with Ms. Arena's name and job title. He linked to the offensive Blogspot.com website he had created. Ms. Arena

contacted Tumblr following this incident and the account was removed within 24 hours. *Id*. at ¶ 15.

- John Doe created an AboutEveryone.com listing using Ms. Arena's name and photograph and including the link to the Blogspot.com website along with other taunting comments regarding "how much trouble she was in." *Id*. at ¶ 16.

- John Doe created a fake Google plus profile, which is still located at https://plus.google.com/102413284441999134450. He obtained all of the contacts in Ms. Arena's GooglePlus circle, including a vast variety of her friends, family members, and business associates, and sent all of Ms. Arena's contacts the link to the offensive "Korean Dating Bloggers" website. *Id*. at ¶ 17.

- John Doe distributed content to Ms. Arena's family members and colleagues that is infringing, sexually explicit and racially discriminatory, in association with Ms. Arena's name and contact information. *Id*. at ¶ 18.

- John Doe engaged in a variety of conduct designed to cause his "Korean Dating Bloggers" website to appear higher in search results for Ms. Arena's name, including tagging the online content with Ms. Arena's place of employment – "AJET," "Arena," "Cailin," "Cailin Arena," "japan," "JET," "korea," "korean," "Osaka," so that it was likely to appear high in Google search results for Ms. Arena's name and place of employment. *Id*. at ¶ 14.

John Doe's acts of cyber stalking and harassment of Ms. McWilliam, from January 20, 2012 to the present, are also described in more detail in the attached declaration. *See* McWilliam Decl.,¶¶ 6-13. They can be summarized as follows:

- John Doe posted on his "Korean Dating Bloggers" website pictures of Ms. McWilliam, screenshots from her online blog (which is anonymous set to "private"), a screenshot taken from a YouTube video Ms. McWilliam posted seven years ago, and screenshot from a dating profile set up by Ms. McWilliam. *Id*. at ¶¶ 6-7.

- John Doe taunts Ms. McWilliam for her Christian beliefs, and apparently knows she is a Christian because on her dating profile, she states that she self-identifies as Christian and would like someone of the same faith for a romantic partner. *Id*. at ¶¶ 10-13.

- He states: "Patri[c]a writes 'anonymously' over at Tumblr (but remember kids you're probably not as anonymous as u think) about how she makes out with a lot of guys at a lot of clubs but won't sleep with any of them. She

seems really proud of this. Probably because she is really super Christian. But what would her pastor would say if he read her tumblr?" *Id*. at ¶ 11.

- John Doe engaged in conduct designed to cause his "Korean Dating Bloggers" website to appear high in search results for her name, such as tagging his website with the terms: "law," "law school," "lawyer," "Christian," "kissing," "making out," "Patricia," "McWilliam," "Patricia McWilliam, "University of South Carolina." Ms. McWilliam is a law school graduate and a graduate of the University of South Carolina. *Id*. at ¶ 10.

- John Doe's website also includes statements Ms. McWilliam made on other websites, and invites strangers to find Ms. McWilliam on Facebook or LinkedIn. *Id*. at ¶ 7.

It is with this background that Plaintiffs' seek to have their writings and photographs removed from his website on the grounds of copyright infringement.

B. John Doe's Reproduction of Plaintiffs' Copyrighted Materials

In conducting his campaign of cyber stalking and harassment against Plaintiffs, John Doe took screenshots of a variety of their online activities over the past year or more. Arena Decl., ¶¶ 12-13; McWilliams Decl., ¶¶ 7, 2-22. He reposted entire pages of their writings, and Ms. Arena's photographs, without alteration on his own website "Korean Dating Bloggers." Arena Decl., ¶¶ 28-30; McWilliams Decl., ¶¶ 21-22. He acknowledges on his website that the writings were authored by the women and owned by the women. Arena Decl., ¶ 30; McWilliams Decl., ¶¶ 20. He admits that he copied them. *Id*.

Ms. Arena owns two copyright applications, filed on February 2, 2012, for the photographs she took and the writings she authored that were republished by John Doe (Serial Nos. 1-720315798 and 1-720315865). Arena Decl., ¶ 27. Ms. McWilliam owns a copyright application, filed February 12, 2012, for the online publications she authored (Serial No. 1-724213741). McWilliam Decl., ¶ 19.

John Doe continues to publish the content that is the subject of these copyright applications on his "Korean Dating Bloggers" website. Arena Decl., ¶¶ 28-29; McWilliam Decl., ¶ 22. All of the copyrighted materials republished by John Doe, of both Ms. McWilliam's and Ms. Arena's, is content that Plaintiffs have since deleted or not made available to the public. *Id*. John Doe saved screenshots of the content and continues to publish it without authorization. *Id*.

C. The Irreparable Harm Resulting From John Doe's Conduct

As described below, irreparable harm is presumed to result from copyright infringement. Plaintiffs' ability to control access to their copyrighted materials, and the use of those materials, has been completely undermined. Arena Decl., ¶ 28; McWilliam Decl., ¶ 21.

Additionally, John Doe's conduct evidences his specific intent to harm the women's employment relationships and opportunities, and those relationships and opportunities are being harmed on an ongoing basis. Arena Decl., ¶¶ 14-22; McWilliam Decl., ¶¶ 8, 15-18. He intentionally emailed Ms. Arena's boss, coworkers, and colleagues offensive materials. Arena Decl., ¶¶ 6-9. He caused his website to appear at the top of Google's search results for both women's names. Arena Decl., Ex. B; McWilliam Decl., Ex. 2. Plaintiffs have suffered and are continuing to suffer severe emotional distress as a result of John Doe's conduct. Arena Decl., ¶¶ 25-26; McWilliam Decl., ¶ 18.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

In considering a motion for preliminary relief, the Court is required to examine: (1) whether the moving party has a reasonable likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm absent the relief requested; (3) whether granting

preliminary relief will result in even greater harm to the nonmoving party; and (4) whether the public interest favors relief. *See, e.g., Kos Pharmaceuticals, Inc. v. Andrx Corp.,* 369 F.3d 700, 708 (3d Cir. 2004); *Am. Greeting Corp. v. Dan-Dee Imports, Inc.*, 807 F.2d 1136, 1140 (3d Cir. 1986). As discussed below, Plaintiffs satisfy all four elements.

A. Plaintiffs Have a Substantial Likelihood of Success On Their Copyright Infringement Claims.

District courts are explicitly given the power to grant temporary injunctions to prevent or restrain copyright infringement under Section 502(a) of the Copyright Act, which states: "[a]ny court having jurisdiction of a civil action arising under this title may…grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." *See* 17 U.S.C. § 502(a).

There are only two elements to a copyright infringement claim. "To establish a claim of copyright infringement, a plaintiff must establish: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff's work." *Mon Cheri Bridals, Inc. v. Wen Wu*, 383 Fed.Appx. 228, 231, 2010 WL 2222497, at *1 (3d Cir. 2010) (*citing Kay Berry, Inc. v. Taylor Gifts*, Inc., 421 F.3d 199, 203 (3d Cir.2005)).

1. Ownership

The evidence of ownership in this case is: (1) Plaintiffs' pending copyright applications for the Copyrighted Materials, Serial Nos. 1-720315798, 1-720315865, and 1-724213741; (2) Plaintiffs' declarations stating that they drafted the writings and took the photographs that are the subject of those copyright applications, and own all rights in the works; and (3) John Doe's admissions on his website that the writings were authored and the photographs taken by Plaintiffs. *See* Arena Decl., ¶¶ 27-30; McWilliam Decl., ¶¶ 19-22. There is no evidence of non-ownership.

A pending copyright application is sufficient to establish ownership of the copyrighted works for the purpose of asserting suit under the Copyright Act; the application need not already have proceeded to registration. *See K-Beech, Inc., v. John Doe*, No. 11-7083, 2012 WL 262722 (E.D. Pa. Jan. 20, 2012) (Schiller, J.); *Degginger v. Houghton Mifflin Harcourt Pub. Co*., No. 10-3069, 2010 WL 3491358 (E.D. Pa. Sept. 2, 2010) (Fullam, J.).

2. Unauthorized Copying of Original Elements

"A plaintiff establishes unauthorized copying by showing that the defendant 'had access to a copyrighted work' and 'that there are substantial similarities between the two works.'" *Mon Cheri Bridals, Inc. v. Wen Wu*, Nos. 09-1239, 09-1321, 2010 WL 2222497, at *5 (3d Cir. June 4, 2010) (*quoting Dam Things from Denmark v. Russ Berrie & Co*., 290 F.3d 548, 561 (3d Cir.2002)). Here, Doe admits that he copied the Plaintiffs' writings. Arena Decl.,¶ 30; McWilliam Decl., ¶ 20. He took screenshots of their writings and photographs and pasted entire pages of them on his website verbatim. *Id*. He made no changes or alterations that Plaintiffs are aware of to the screenshots; his goal was merely the reproduction of the works. Arena Decl., ¶¶ 27-30; McWilliam Decl., ¶¶ 20-22. Finally, although most of the materials have not been online for a lengthy period of time, the Copyrighted Materials were at one time all posted online and accessible by John Doe. Arena Decl., ¶ 30; McWilliam Decl., ¶¶ 20, 22.

B. Plaintiffs Are Suffering Irreparable Harm.

The Third Circuit has found "that a showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits raises a ***presumption*** of irreparable harm." *Apple Computer, Inc. v. Franklin Computer Corp*., 714 F.2d 1240, 1254 (3d Cir. 1983) (stating that "the prevailing view [is] that a showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits raises a presumption of irreparable harm.") (emphasis added). *See also FMC Corp. v. Control Solutions, Inc*., 369

F.Supp.2d 539, 573-74 n. 42 (E.D. Pa. 2005) (finding that the plaintiff "made out a prima facie case of infringement and therefore is entitled to a rebuttable presumption of irreparable injury."); *Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd*., 555 F.Supp.2d 537, 543 (E.D. Pa. 2008) (irreparable harm presumed to flow from copyright infringement).

Moreover, irreparable injury is shown if "a plaintiff demonstrates a significant risk that he...will experience significant harm that cannot adequately be compensated, after the fact, by monetary damages." *Adams v. Freedom Forge Corp*., 204 F.3d 475, 484 (3d Cir. 2000). Plaintiffs face irreparable injury in the form of significant damage to their ability to conduct any online activities without fear of John Doe's unlawful conduct, damages to their reputations, contractual and prospective contractual relationships, and emotional well being if injunctive relief is not granted. It is unknown how long it will take for Plaintiffs to identify John Doe through discovery, using their best efforts to do so, so it is also possible that the materials will remain online for a lengthy period of time in the absence of an injunction. In addition, the longer the Copyrighted Materials remain online, the greater the chance they will be saved and reproduced by other third parties. Accordingly, Plaintiffs have established the second prerequisite for a preliminary injunction.

C. The Public Interest and Balance of Hardships Strongly Favor an Injunction.

As injunction which enforces federal copyright laws, and protects the rights and responsibilities defined by them, is by definition in the public interest. *See Apple Computer*, 714 F.2d at 1255 ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work."); *Broadcast Music, Inc.,* 555 F.Supp.2d at 544 (same). An injunction would therefore serve the public interest.

Second, the hardship to John Doe is non-existent, because he never had a right to publish the Plaintiffs' copyrighted materials in the first instance, and is doing so anonymously. He derives no legally-recognizable benefit from his publication of the copyrighted materials. On the other hand, if not enjoined, John Doe's activities will continue to harm Plaintiffs irreparably, as described above.

II. PLAINTIFFS ARE ENTITLED TO LIMITED EXPEDITED DISCOVERY TO IDENTIFY JOHN DOE.

Plaintiffs also seek leave of Court to pursuant to F.R.C.P. 26(d) to serve the attached document requests on defendant Google, Inc., in aid of this motion against John Doe and in advance of the preliminary injunction hearing. Courts have held that expedited discovery is "particularly appropriate" where, as here, preliminary injunctive relief is sought, because of the "expedited nature of injunctive proceedings." *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996). *See also* Fed. R. Civ. P. 26(d) 1993 Advisory Committee Note (noting that early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction"); Moore's Federal Practice § 26.121 ("Expedited discovery is often appropriate in cases involving preliminary injunctions").

Courts have also uniformly approved the procedure of suing John Doe defendants and then utilizing expedited discovery to identify such defendants. *See, e.g., K-Beech, Inc., v. John Doe*, No. 11-7083, 2012 WL 262722 (E.D. Pa. Jan. 20, 2012) (Schiller, J.); *Fonovisa, Inc. v. Does 1-9*, No. 07-1515, 2008 WL 919701, at *10 (W.D.Pa. Apr. 3, 2008) (remarking that "numerous" district courts have found good cause for expedited discovery in copyright infringement actions seeking to identify Doe defendants); *UMG Recordings, Inc. v. Doe*, C 08-1193, 2008 WL 4104214 (N.D. Cal. Sept. 3, 2008) (same). "Situations where good cause is frequently found include when a party seeks a preliminary injunction, and when physical

evidence may be consumed or destroyed with the passage of time, thus causing one or more parties to be disadvantaged." *Fonovisa*, 2008 WL 919701, at *10.

Here, good cause exists for expedited discovery because: (1) Plaintiffs have made a prima facie showing of infringement and seek a preliminary injunction, (2) there is no other way to identify John Doe and give him notice of this proceeding, and (3) there is a risk that Google, Inc., will inadvertently destroy identifying information if expedited discovery is not granted. *See UMG Recordings, supra* (finding good cause for expedited discovery exists in Internet infringement cases, where a plaintiff makes a prima facie showing of infringement, there is no other way to identify the Doe defendant, and there is a risk an ISP will destroy its logs prior to the conference). Since as noted in *UMG Recordings*, the identifying records may be destroyed before a 26(f) Conference, there is good cause to grant expedited discovery.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for limited expedited discovery, a temporary restraining order and a preliminary injunction and order that defendant John Doe cease publishing the Copyrighted Materials on his "Korean Dating Bloggers" website, which is located at http://www.secretlivessexbloggers.blogspot.com/.

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