

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

BEDFORD, FREEMAN & WORTH
PUBLISHING GROUP, LLC d/b/a
MACMILLAN LEARNING; MACMILLAN
HOLDINGS, LLC; CENGAGE LEARNING,
INC.; ELSEVIER INC.; ELSEVIER B.V.;
MCGRAW HILL LLC; and PEARSON
EDUCATION, INC.,

Plaintiffs,

v.

SHOPIFY INC.,

Defendant.

Case No. 1:21-cv-01340

**DEFENDANT SHOPIFY INC.'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION TO COMPEL**

TABLE OF CONTENTS

I. Introduction.....1

II. Factual Background.....1

III. Argument.....5

 A. Relevant Legal Standard For the Parties’ Claims and Defenses.....6

 B. Plaintiffs’ Requests For Information Regarding Non-Alleged Merchants
 Should Be Denied As Unnecessary8

 1. Shopify Has Already Agreed to Produce Relevant and
 Proportionate Information Concerning Non-Alleged Merchants8

 a. Plaintiffs Misread Shopify’s Response to RFP No. 17, and
 Then Needlessly Moved To Compel Without Conferring.....9

 b. Shopify Has Proposed A Reasonably Tailored Solution to
 Address RFPs Nos. 20-21 and Rogs. Nos. 9-10.10

 C. Plaintiffs’ Requests For Discovery Outside The Limitations Period Are
 Irrelevant And Disproportionate14

 1. Documents Years Outside the Limitations Period Are Not Relevant.....14

 a. Alleged Pre-Limitations Infringement by Shopify
 Merchants “Writ Large” Does Not Demonstrate
 “Knowledge.”14

 b. The Specific Discovery Sought By Plaintiffs Is Not
 Relevant To Knowledge16

 c. Shopify’s Policies Prior To The Limitations Period Are Not
 Relevant To Its DMCA Safe Harbor Defense17

 d. Pre-Limitations Discovery Is Not Relevant To Statutory
 Damages.....20

 2. The Requested Pre-Limitations Production Would Be Unduly
 Burdensome and Disproportionate22

IV. Conclusion24

I. INTRODUCTION

Shopify has agreed to produce—and has already begun producing—extensive, costly, time-intensive, and voluminous material relevant to the claims Plaintiffs actually pled (*i.e.*, infringement of Plaintiffs’ specific copyrighted works by the Alleged Merchants¹) and Shopify’s defenses in this case. In an effort to needlessly harass and significantly increase the burden on Shopify, Plaintiffs have moved to compel two additional sets of data: (1) information related to Shopify’s records with respect to responding to notices of infringement and enforcing its repeat infringer policy; and (2) information on a wide swath of discovery requests where Shopify agreed to respond, but limited its response to the past three-and-a-half years, rather than the five-and-a-half years demanded by Plaintiffs. Both requests should be denied, but for different reasons.

With respect to the first set of data, regarding responding to notices of infringement and enforcing the repeat infringer policy, Plaintiffs’ motion is moot. Shopify *agrees* that during the relevant limitations period, Plaintiffs should receive relevant, proportionate information on Shopify’s infringement policies, procedures, and practices, beyond the Alleged Merchants. The parties were deep in conferral on *how* to accomplish this, when Plaintiffs jumped the gun, filing their motion despite Shopify’s good-faith efforts to produce essentially everything Plaintiffs have asked for within the limitations period. Shopify continues, in good faith, to identify and produce this information. To the extent any live dispute remains, the Court should hold that Shopify’s planned production of responsive information is adequate.

With respect to the second set of data—Plaintiffs’ proposal to require Shopify to search for and produce an additional *two years* of records, including from a legacy infringement tracking

¹ The “Alleged Merchants” refers to any Shopify Merchants that were identified in response to an Infringement Notice sent by or on behalf of Plaintiffs, regarding any of the Copyrighted Works or Trademarks upon which Plaintiffs bring suit (Exhibits A and B to the Complaint), within the limitations period, *i.e.*, between December 1, 2018 and March 1, 2022.

system that was not used at all during the limitations period—Plaintiffs’ motion should be denied as exceeding the bounds of permissible discovery under the Federal Rules. The pre-limitations information Plaintiffs seek (including records of merchants that are not accused of infringement in this case) is neither relevant nor proportional to the needs of the case. Plaintiffs’ arguments to the contrary are premised on fundamental misstatements of governing law, including the binding law of the Fourth Circuit on Shopify’s relevant “knowledge.” Even if the documents sought by Plaintiffs were of some attenuated relevance to this case, that marginal relevance is far outweighed by the burden of reviewing an additional two years of materials, which would increase by approximately 60 percent the temporal scope of Shopify’s (already robust) document review.

Shopify is committed to providing relevant and proportionate discovery, so that this case may be expeditiously decided on its merits. It has agreed to produce information on all “tickets” concerning the Alleged Merchants from Shopify’s ticketing system used for tracking notices of infringement, communicating with Alleged Merchants, applying infringement “strikes,” and terminating Merchants. It has agreed to produce all communications with the Alleged Merchants themselves, including those relating to infringement tickets, strikes, notices, or IP infringement generally, without time limitations. It has agreed to produce all communications, during the limitations period, concerning alleged infringement by the Alleged Merchants. It has already produced 13,000 pages of responsive documents, and is preparing to produce thousands more. But Plaintiffs’ requests in their Motion for further and additional discovery stray far beyond the bounds of relevant and proportionate discovery under the Federal Rules, and should be denied.

II. FACTUAL BACKGROUND

Plaintiffs’ Motion challenges (i) Shopify’s limitation of its responses to seven Requests for Production (RFPs 6, 11, 14, 20, 21, 25, and 30) and five Interrogatories (Rogs. 1-3, 9, and 10) to the statute of limitations period, and (ii) Shopify’s ostensible limitation of three Requests for

Production (RFPs 17, 20 and 21) and two Interrogatories (Rogs. 9 and 10) to the 3,426 alleged infringements and the approximately 1,800 alleged infringing merchants actually at issue in this suit. Dkt. 56 at 6-7, 10-12; *see also* Dkt. 1 at Exs. A-B. Critically, for RFPs Nos. 6, 11, 14, 25, and 30, and Rogs. Nos. 1-3, Plaintiffs challenge only the temporal scope of Shopify’s discovery responses—Plaintiffs seek information going back to January 1, 2017, despite the limitations period beginning nearly two years later—but Plaintiffs do not presently dispute the adequacy of the categories of responsive information that Shopify has agreed to produce. For RFP 17, Plaintiffs challenge the substantive limits of Shopify’s response, but not the limitation of its response to the limitations period. For the remaining RFPs 20 and 21, and Rogs. 9 and 10, Plaintiffs dispute both the substantive and temporal limits of Shopify’s response. However, as explained below, with respect to the substantive dispute, Plaintiffs’ motion is premature and there is actually little or no difference between the parties’ respective positions.

As detailed *infra*, Shopify believes that it has already agreed to produce all discovery to which Plaintiffs are entitled under the standard articulated by Rule 26 of the Federal Rules of Civil Procedure. But Plaintiff’s motion obscures, rather than illuminates, the voluminous discovery on these topics that Shopify has already agreed to produce, and in many cases has already commenced producing, namely the following:

- **Alleged Merchant Information (RFPs Nos. 25, 30):** Plaintiffs requested all documents discussing any “Infringement Notice” from Plaintiffs to Shopify concerning Shopify Merchants; and all documents concerning any “warnings, ratings, risk assessments, flags” relating to risk for the foregoing Merchants. Dkt. 56-1 at 38, 45. In response, Shopify is willing to produce (i) all communications *with* the Alleged Merchants in Shopify’s possession, custody, or control (without time limitation); (ii) all “information from [Shopify’s]

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