

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

FATWALLET, INC.

Plaintiff,

- vs. -

BEST BUY ENTERPRISE SERVICES, INC.,
KOHL's DEPARTMENT STORES, INC. and
TARGET CORPORATION

Defendants

Case No. 03C50508

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COMPLAINT FOR DECLARATORY RELIEF
AND DEMAND FOR JURY TRIAL

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Attorneys for Plaintiff
FATWALLET, INC.

Plaintiff FatWallet, Inc., by its attorneys, brings this action against Defendants Best Buy Enterprise Services, Inc., Kohl's Department Stores, Inc., and Target Corporation, and states:

1. This lawsuit arises out of retailers' repeated misuse of the Digital Millennium Copyright Act ("DMCA"), which is codified at 17 U.S.C. § 512, to violate the statutory and constitutional rights of Internet service providers, such as plaintiff FatWallet, Inc., and their anonymous users. For the second consecutive year, retailers have served "takedown" notices under the DMCA on FatWallet, threatening multiple lawsuits against FatWallet in multiple jurisdictions unless it deletes from its online message boards factual information, rumors and commentary about after-Thanksgiving sales prices that have been posted by anonymous computer users. Some of these retailers have also issued subpoenas under the DMCA demanding that FatWallet immediately identify the anonymous users who post such information, rumors and commentary, thus depriving FatWallet of sufficient time to notify its users that their confidential records and information have been subpoenaed.

2. The DMCA does not authorize retailers to circumvent the procedural and substantive protections of state law by converting what would, at most, constitute garden-variety trade secret information into purportedly copyrighted works subject to the unique takedown and subpoena provisions of the DMCA. Moreover, the DMCA's notice and subpoena provisions violate the First and Fifth Amendments to, and Article III of, the United States Constitution.

3. To prevent this misuse of the DMCA from recurring each year, as is bound to occur absent intervention by this Court, FatWallet seeks a declaration that the

rumors, commentary and excerpts of sales price information that were the subject of takedown notices from Defendants Best Buy Enterprise Services, Inc., Kohl's Department Stores, Inc., and Target Corporation, are not protected by copyright law and/or not infringing, and that the takedown notices and related subpoena were and are invalid and void. FatWallet also seeks a declaration that the DMCA provisions authorizing such takedown notices and subpoenas violate the First and Fifth Amendments to, and Article III of, the United States Constitution, and that the subpoena violates the DMCA and Federal Rules of Civil Procedure as well as the Due Process Clause of the Fifth Amendment.

THE PARTIES

4. Plaintiff FatWallet, Inc., is an Illinois corporation with its principal place of business in Roscoe, Illinois. FatWallet operates a website at the domain name www.fatwallet.com which contains information about bargain shopping for a wide variety of goods.

5. On information and belief, Defendant Best Buy Enterprise Services, Inc., is a St. Paul, Minnesota-based large national retailer of consumer electronic goods.

6. On information and belief, Defendant Kohl's Department Stores, Inc., is a large national retailer, with department stores located throughout the United States and corporate headquarters in Menomonee Falls, Wisconsin.

7. On information and belief, Defendant Target Corporation is a large national retailer, with department stores located throughout the United States and corporate headquarters in Minneapolis, Minnesota.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), and § 2201, as this is a declaratory relief action arising under federal law, namely, 17 U.S.C. § 101 *et seq.* (Copyright Act) and the United States Constitution.

9. This Court has jurisdiction over Defendants Best Buy, Kohl's and Target because, on information and belief, they do business in the State of Illinois and within this judicial district.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because a substantial part of the events which give rise to the controversy occurred in this judicial district and this is an action arising under the Copyright Act (17 U.S.C. § 101 *et seq.*).

BACKGROUND

11. An actual controversy has arisen between the parties over various provisions of the DMCA and the legality and constitutionality of Defendants' purported use of those provisions as set forth herein.

A. The Digital Millennium Copyright Act ("DMCA")

12. The DMCA was enacted in 1998. Title II of the DMCA provides immunity, or a "safe harbor" from copyright infringement claims, to online "service providers" who transmit, store or host content on computer networks. *See* 17 U.S.C. § 512(a)-(d). Pursuant to 17 U.S.C. § 512(c)(1), an online service provider is not liable for copyright infringement "by reason of storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider," if certain conditions are met. Specifically, upon receiving a notice of claimed copyright

infringement (a so-called “takedown notice”) pursuant to 17 U.S.C. § 512(c)(3), an online service provider must “expeditiously” remove or disable access to allegedly infringing material in order to remain within the DMCA’s safe harbor. Otherwise, the online service provider faces the risk of liability for infringement. *See* 17 U.S.C. § 512(c)(1)(C).

13. In addition, Title II of the DMCA also contains a unique provision allowing copyright owners or their agents to obtain and serve subpoenas on online service providers demanding that they divulge information or documents regarding the identities of alleged infringers (*i.e.*, the computer users who posted the allegedly infringing materials). 17 U.S.C. § 512(h). With any such subpoena, the copyright owner or its agent must also file with the Court and serve on the service provider a notice of claimed infringement pursuant to Section 512(c)(3)(A). *Id.*

B. The FatWallet Website

14. Plaintiff FatWallet operates a website at the domain name www.fatwallet.com. FatWallet’s website contains a wide variety of information about sales, discounts, coupons and other information related to bargain shopping.

15. Much of the information about sales and discounts on the FatWallet web site is provided by retailers themselves. In addition, like many other websites, the fatwallet.com site contains a message board that allows users to post information, share ideas, and discuss bargain shopping. Some users, without FatWallet’s prior knowledge, have posted information about soon-to-be-announced sales prices for various retailers’ day-after-Thanksgiving sales, including Best Buy, Kohl’s and Target.

C. The Retailers’ Takedown Notices and Subpoenas

16. In 2002, several large retailers -- including Defendants Best Buy

and Target, as well as Wal-Mart Stores, Inc., K-Mart, Inc., and Jo-Ann Stores -- each sent takedown notices under the DMCA to FatWallet shortly before the Thanksgiving weekend. These notices demanded that FatWallet immediately remove from its website various day-after-Thanksgiving sales prices that had been posted by computer users on the message board on the FatWallet website, prior to their public dissemination by the retailers.

17. Faced with the threat of defending multiple lawsuits in multiple jurisdictions for alleged copyright infringement, FatWallet removed the posts containing the sales prices from its web site even though it vehemently disputed the retailers' claim that such factual information is protected by the Copyright Act. Fat Wallet also objected to a DMCA subpoena that Wal-Mart had served demanding production of records to identify a computer user who had posted Wal-Mart sales prices. Rather than litigate the matter, Wal-Mart withdrew its subpoena.

18. In response to the 2002 takedown notices from Best Buy and Target, FatWallet specifically informed these Defendants that their sales prices were mere facts not protected by the Copyright Act, that its advertising circulars are not sufficiently original to merit copyright protection, and that the posts in question were not infringing. Nevertheless, Best Buy and Target repeated their conduct again this year, and were joined by Defendant Kohl's.

19. After the close of business on Friday, November 14, 2003, Best Buy sent to FatWallet via email another DMCA takedown notice, which demanded that FatWallet immediately remove certain of Best Buy's Thanksgiving sales prices that had been posted by users on FatWallet's website. In its letter, Best Buy claimed that its

copyrights were being violated and accused FatWallet of allowing the posting of allegedly infringing and proprietary materials. Although the letter purported to attach a list of the allegedly infringing posts, no such list was attached to the emailed notice. A copy of the allegedly infringing posts was finally forwarded to FatWallet the following week (a true and correct copy of which is attached hereto as Exhibit A).

20. In addition to its takedown letter, this year Best Buy also sent to FatWallet a subpoena, purportedly issued pursuant to the DMCA, demanding that FatWallet produce records to identify the computer users who had posted the sales prices at FatWallet's web site. The subpoena was issued from the District of Minnesota, not Illinois, yet demanded production of records in Minneapolis, Minnesota which is over 100 miles from FatWallet's offices in Roscoe, Illinois and was never personally served on FatWallet. Although the subpoena was sent to FatWallet by e-mail after business hours on Friday, November 14, 2003, it purported to demand production by 9:00 a.m. the following Tuesday, November 18, thereby giving FatWallet only one business day to respond.

21. On November 19, 2003, counsel for FatWallet objected in writing to Best Buy's subpoena and takedown notice on several procedural and substantive grounds. Best Buy has not withdrawn its subpoena and, in a reply dated November 21, Best Buy's counsel reiterated its assertion that FatWallet was liable under copyright law for the allegedly infringing posts.

22. On November 19, 2003, FatWallet received another takedown notice from another large retailer, Defendant Kohl's. Like Best Buy's takedown notice, Kohl's takedown notice demanded that FatWallet remove from its website postings that

contained factual information about Kohl's after-Thanksgiving sales prices. Like Best Buy, Kohl's specifically threatened FatWallet with litigation on the theory that "[c]ontinuance of these posting [sic] violates Kohl's intellectual property rights and may constitute other violations of law or subject you to liability." However, when FatWallet's counsel contacted Kohl's counsel by telephone to discuss the matter, Kohl's made it clear that its primary concern was that dissemination of its sales price information prior to the publication by Kohl's would violate its state law right to protect *trade secret* information, rather than violate any federal copyrights. In response to FatWallet's request for further information to support its takedown letter under the DMCA, Kohl's did not provide a copy of any copyright registration for its price information, but did forward to FatWallet a photocopy of the allegedly infringing posts (a true and correct copy of which is attached hereto as Exhibit B).

23. On November 20, 2003, FatWallet received its third takedown notice in less than a week from a third national retailer, Defendant Target. The prior day, November 19, Target had sent FatWallet a letter demanding that it take down allegedly false sales price information. In its second letter, Target asserted that it owned a copyright in an "unpublished newspaper-insert advertising circular" that would be distributed on Thanksgiving day, and demanded that FatWallet remove from its website a "rumor" list of prices posted on the FatWallet message board under the header "Update & Complete Target BF Rumor List," and other posts to the FatWallet message board that repeated portions of the rumored price list. Target claimed that its copyright in the advertising circular was being infringed by the posted price list and related messages posted to the FatWallet web site (a true and correct copy of which is attached hereto as

Exhibit C).

24. Threatened with multiple potential lawsuits in multiple jurisdictions, Fat Wallet was compelled to remove from its web site various message board posts, or to redact content from such posts, that contained pricing information even though it disputed these retailers' claims that such factual information is protected by copyright law and that the posts at issue were infringing.

25. The numerous and repeated takedown notices and subpoenas that FatWallet received in 2002 and again in 2003 concerning Thanksgiving sales information has caused actual and/or threatened injury to FatWallet and its users. There is a substantial controversy between the parties regarding the legality of Defendants' actions and their demands for compliance with subpoenas that are unlawful; this controversy is of sufficient immediacy to warrant the issuance of declaratory relief so that FatWallet will not be repeatedly faced with such unlawful takedown notices and subpoenas from Defendants and many other large retailers, or faced with the prospect of infringement claims or litigation to enforce such notices and subpoenas now and in the future.

CLAIMS FOR RELIEF

Claim One

Declaratory Relief under the DMCA

(Against All Defendants)

26. FatWallet incorporates by reference the allegations contained in paragraphs 1 through 25, inclusive.

27. The takedown notice and subpoena provisions of the DMCA apply only to material protected by copyright that may be infringed. Under 17 U.S.C. §

512(c)(3)(v), a “copyright owner” or its agent issuing a takedown notice must identify the “copyrighted material” claimed to have been infringed, and attest that the notifying entity is authorized to act on behalf of the owner of a valid copyright. Under 17 U.S.C. § 512(f), any person who knowingly makes a material misrepresentation that content or activity infringes a copyright shall be liable for damages and fees incurred by an online service provider that relied upon such misrepresentation in removing or disabling access to such material or activity. Under 17 U.S.C. § 512(h), only a copyright owner or its agent may request issuance of a DMCA subpoena, and must file a statement with the court issuing the subpoena that the subpoena is sought to obtain the identity of a copyright infringer.

28. Despite the fact that the DMCA takedown notices and subpoena provisions apply only to copyrighted material, Defendants Best Buy, Kohl’s and Target have delivered to FatWallet takedown notices under the DMCA demanding that FatWallet remove from its website user-created messages or posts that contain *factual* information, such as sales prices that are not protected by copyright. Under the Supreme Court’s direction in *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), mechanical factual compilations, such as price lists and advertising circulars, are not sufficiently original to merit copyright protection, and any copyright protection that Defendants may have in a factual compilation is extremely “thin” and only infringed by virtual verbatim reproduction of the compilation.

29. The posts about which Defendants complained do not constitute virtual verbatim reproductions of Defendants’ advertising circulars. The posts do not contain any of the formatting, arrangement, or other content of the advertising circulars

that Defendants typically distribute, but simply contain individual facts -- prices or lists of prices -- that are not protected by copyright. For example, the primary post about which Best Buy complained, and that FatWallet was compelled to remove, simply lists a handful of items that the user/poster believed would be on sale and the rumored sales prices, which were based on another post the user saw on another message board:

I got this from another board so this is all the info I have. The OP [original poster] claims to have the ad, so it appears legit

Maxtor 120GB 7200RPM Internal HD w/8MB Buffer -- \$[redacted]
SanDisk 256MB CF Card - \$[redacted]
SanDisk 256MB SD Card - \$[redacted]
DVD XCopy: Gold - \$[redacted]
Norton SystemWorks/AntiSpam/Firewall 3-in-1 package - \$[redacted]
Lite-On 4x Multi-Format DVD Burner - \$[redacted]
Samsung 17" LCD Monitor - \$[redacted]
ATI Radeon 9600 128MB - \$[redacted]
Sony P-10 5MP Digital Camera w/free 64MB MS - \$[redacted]
Canon Powershot A70 3.2MP w/free 64MB CF - \$[redacted]. . .

Exh. A. Such pure factual information, and the mechanical compilation of same, is not protected by copyright law.

30. Similarly, the primary posts that both Defendant Kohl's and Target complained about did not purport to reproduce their printed advertising circulars, but simply reposted factual information that had been "[r]eformatted and organized" by the individuals who had originally posted the information elsewhere on the Internet. Exh. C at 1; *see also* Exh. B at 1.

31. To the extent Defendants are attempting to claim that the posts infringe some sort of copyright protection in the sales prices themselves, such claims are barred not only by the pure factual nature of the information, but also by the merger and fair use doctrines, among other copyright doctrines and defenses. For example, the

“idea” in the allegedly copyrighted material (the sales price) merges with the expression of this idea in that there is simply only one way to express a sales price. The fair use doctrine would also apply regardless of whether Defendants claim copyright in their advertising circulars or the prices themselves because, *inter alia*, the posts are non-commercial and transformative in nature, Defendants works are factual, and the posts will have no negative impact on the market for Defendants’ circulars.

32. Moreover, all Defendants takedown notices referenced, and Defendants Best Buy and Kohl’s notices were supplemented by, long lists of allegedly infringing posts, which followed the original posts and contained users’ commentary or critiques about these Defendants’ prices, products or practices, and which Defendants also demanded that FatWallet remove. Such commentary and critiques are not owned, created or copyrightable by Defendants, but instead constitute speech protected by the First Amendment.

33. In addition to its takedown notice, Best Buy also issued a subpoena seeking information identifying FatWallet subscribers based on an asserted “good faith belief” that Best Buy’s sales prices are protected by copyright law.

34. In the past, other retailers have also sent DMCA takedown notices or subpoenas to FatWallet demanding the removal of sales prices or records revealing the identities of users who posted such information.

35. Defendants’ conduct has injured and threatens to continue to injure FatWallet by forcing it to devote substantial resources responding to and defending against such repeated takedown notices and subpoenas and by compelling FatWallet to censor non-infringing factual information and related speech to avoid litigation. The

takedown demands and subpoenas also threaten to injure FatWallet's goodwill with its subscribers and further threaten the rights of FatWallet's subscribers to privacy and free expression and association on the Internet. Moreover, these repeated takedown demands and subpoenas have also created a reasonable apprehension in FatWallet that Defendants and other retailers will continue to repeatedly issue such improper demands and subpoenas under the implicit or express threat of multiple litigation in multiple jurisdictions, either through copyright infringement litigation or via motions to enforce DMCA subpoenas.

36. An actual, present, and justiciable controversy has arisen between FatWallet and Defendants as to whether or not the sales prices and other factual sales information are protected by copyright law, and/or whether posts to FatWallet message boards concerning such information is infringing, and consequently whether the repeated issuance of takedown notices and/or subpoenas to FatWallet and other online service providers like FatWallet is authorized by the DMCA.

37. FatWallet seeks declaratory judgment from this Court that this information is not protected by copyright law, and/or that the posting to factual information concerning some of the retailers' sales prices is not infringing under the Copyright Act, and therefore the DMCA does not authorize the issuance of takedown notices and subpoenas to service providers such as FatWallet and Defendants' takedown notices and subpoena are improper and of no legal effect.

Claim Two

Declaratory Relief under the First and Fifth Amendments of the U.S. Constitution

(Against All Defendants)

38. FatWallet incorporates by reference the allegations contained in paragraphs 1 through 37, inclusive.

39. The DMCA provisions allowing for takedown notices and the issuance of subpoenas to discover information identifying the anonymous message board users who post information to message boards hosted by service providers, such as FatWallet, violates the rights guaranteed to FatWallet and its users under the First and Fifth Amendments (Due Process Clause) of the United States Constitution. The DMCA does not provide sufficient procedural safeguards to protect the liberty and property interests of service providers, such as FatWallet, or the expressive and associational rights, including the privacy right to anonymous speech, of message board users.

40. The DMCA does not provide for notice to the individual message board user or an opportunity to be heard, nor does it require any judicial or administrative determination of copyrightability, ownership, or even a prima facie showing of same. Consequently, a service provider that receives a takedown notice under the DMCA must, to avoid potential litigation and liability, remove or edit speech without being provided with even the minimal information necessary to determine whether the notifying entity's material actually falls within the scope of the works protected by copyright law and/or whether the challenged posts are infringing. Moreover, the DMCA does not allow the service provider any time to notify the user or conduct any investigation before removing or disabling access to the posts at issue. In these ways, among others, the DMCA

unconstitutionally shifts the burden to service providers, such as FatWallet, either to delete speech that may not be infringing and may be protected by the First Amendment, or face a substantial risk of litigation without sufficient information to assess the true nature of that risk.

41. Moreover, the DMCA subpoena provision, codified at 17 U.S.C. § 512(h), allows an entity or individual to use a district court's power to uncover the identity of an anonymous message board user simply by asserting a "good faith" belief that it owns a copyright that it alleges is being infringed. Once again, the DMCA provides for no notice to the user, nor sufficient time for the service provider to notify the user or to allow the user to file a motion to quash, thereby again unconstitutionally shifting the burden to service providers, like FatWallet, to oppose a subpoena, like the Best Buy subpoena, that appears to be designed not to identify an alleged copyright infringer but instead to unmask anonymous speakers whose First Amendment activity the subpoenaing party seeks to chill.

42. FatWallet is entitled to raise the constitutional rights of its users because of the close relationship between FatWallet and its users, because injury to FatWallet's users also causes concrete injury to FatWallet, and because FatWallet's users are unable to properly raise their own rights or may be unaware that their rights are being violated.

43. An actual, present and justiciable controversy has arisen between FatWallet and Defendants concerning the constitutionality of the provisions of the DMCA authorizing takedown notices and subpoenas to service providers.

44. FatWallet seeks declaratory judgment from this Court that the provisions of the DMCA authorizing takedown notices and subpoenas are unconstitutional.

Claim Three

Declaratory Relief under Article III of the U.S. Constitution

(Against Defendant Best Buy)

45. FatWallet incorporates by reference the allegations contained in paragraphs 1 through 44, inclusive.

46. Best Buy's DMCA subpoena to FatWallet demanding information about the identity of a certain FatWallet customer(s) is not related to any pending litigation.

47. The DMCA provisions allowing for the issuance of subpoenas seeking information identifying the customers of an online service provider, such as FatWallet, in the absence of a underlying and pending case or controversy arising under federal law violates Article III of the Constitution.

48. An actual, present and justiciable controversy has arisen between FatWallet and Defendants concerning the constitutionality of the provisions of the DMCA regarding the issuance and enforcement of judicial subpoenas outside the context of a pending case of controversy within the jurisdiction of the federal courts.

49. FatWallet asks the Court to declare that the subpoena power contained in 17 U.S.C. § 512(h) is limited to judicial process issued and enforced in aid of a pending lawsuit under the Copyright Act.

Claim Four

Declaratory Relief under the DMCA, FRCP 45 and the Fifth Amendment

(Against Defendant Best Buy)

50. FatWallet incorporates by reference the allegations contained in paragraphs 1 through 49, inclusive.

51. Although FatWallet is headquartered in this district, the DMCA subpoena sent by Best Buy to FatWallet after business hours on Friday, November 14, 2003 was issued by the United States District Court for the District of Minnesota, *not* Illinois, and demanded production of documents in Minneapolis, Minnesota -- which is more than 100 miles from FatWallet's offices -- by 9:00 a.m. on Tuesday, November 20, 2003, little more than one business day after the subpoena was sent.

52. Section 512(h)(6) of the DMCA specifies that "procedures for the issuance and delivery of the subpoena ... shall be governed by those provisions of the Federal Rules of Civil Procedure governing the issuance, service and enforcement of a subpoena duce tecum," unless otherwise provided by DMCA. Rule 45(b)(2) requires that a subpoena be served "within the district of the court by which it is issued, or at any place without the district that is 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena . . ." The subpoena demanded production in Minneapolis, Minnesota, more than 100 miles from FatWallet's offices in Roscoe, Illinois.

53. FatWallet is an Illinois corporation with its principal place of business in Roscoe, Illinois. It lacks the necessary minimum contacts with the District of Minnesota with regard to the transactions at issue, posting of sales prices by users of the

FatWallet web site. Under the Due Process Clause of the Fifth Amendment, FatWallet cannot be subject to the jurisdiction of the courts of the District of Minnesota. The United States District Court for the District of Minnesota is not the proper jurisdiction for the issuance of a subpoena to FatWallet.

54. An actual, present and justiciable controversy has arisen between FatWallet and Defendant Best Buy concerning the proper court for issuance of subpoenas pursuant to Section 512(h), and the proper place for and manner of service of such subpoenas. This precise issue also arose last year with respect to a subpoena from Wal Mart to FatWallet, but Wal-Mart withdrew its subpoena before the issue could be litigated.

55. FatWallet seeks declaratory judgment from this Court against Defendant Best Buy that any subpoena seeking the identity of a FatWallet subscriber must be issued from the district in which FatWallet is located (the Northern District of Illinois), and must be personally served upon FatWallet's custodian of records.

56. FatWallet also seeks a declaration from this Court that a retailer, such as Best Buy, that serves a DMCA subpoena on an online service provider, such as FatWallet, must give that service provider a reasonable time period to respond to the subpoena so that the service provider can give its users notice and a meaningful opportunity to be heard in court prior to release of personal identifying data.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FatWallet prays:

1. That the Court enter judgment according to the declaratory relief sought as against each Defendant;

2. For reasonable attorneys fees and costs of suit incurred herein pursuant to 17 U.S.C. §§ 505 and 512(f) and any other applicable law; and

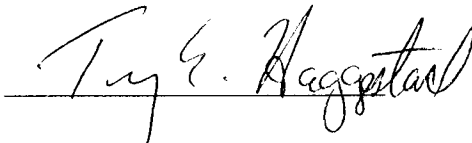
3. For such further relief to which FatWallet may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

JURY DEMAND

FatWallet hereby requests a trial by jury.

DATED: November 25, 2003

Respectfully submitted,
FATWALLET, INC.

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