

**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 ANSWER TO COMPLAINT

Defendant Shopify Inc. (“Shopify”), by and through its attorneys of record, respectfully submits this Answer and Affirmative and Additional Defenses to Plaintiffs 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.’s (collectively, “Plaintiffs”) Complaint (Dkt. 1) as follows:

PRELIMINARY STATEMENT

For more than 25 years, Congress has considered the public policy question of what to do about copyright infringement on the internet. Plaintiffs in this lawsuit dislike the answer that Congress has embraced, and have supported bills that would overhaul the statutory regime that has been in place since 1998. Under that existing law, known as the Digital Millennium Copyright Act (“DMCA”), copyright owners are free to pursue actions against users who themselves

distribute infringing content on the internet. But Congress decided to preclude suits for money damages against the companies that host the infrastructure that those individual infringers might use, so long as the companies generally comport themselves responsibly—expeditiously taking down content that rightsholders flag as infringing, and terminating the accounts of users who repeatedly misuse internet services to infringe the rights of others. Plaintiffs here, a collection of publishers of academic textbooks, have unsuccessfully asked Congress to change that law to impose liability for the infringements of others on internet platforms like Shopify, thereby expanding the universe of actors subject to copyright damages.¹

This lawsuit is an attempt to do through this Court what Plaintiffs could not achieve in the legislative sphere. Plaintiffs claim that Shopify, a company in the business of providing technological tools for third parties to use, is liable for the rare instances in which those third parties misuse Shopify’s tools to commit copyright infringement. And in an effort to plead around the statutory scheme that they dislike and have tried to displace, Plaintiffs falsely allege that Shopify has been unresponsive to their notices of claimed infringement and slow to terminate the accounts of merchant subscribers (“Merchants”) who are the subject of multiple allegations.

The truth is that Shopify has promptly and appropriately responded to the notices of claimed infringement these textbook publishers have sent. It has appropriately responded to court orders and requests for information consistent with its legal obligations as an international company with customers in multiple jurisdictions. *See Guidelines for Legal Requests for Information*, <https://www.shopify.com/legal/gvtaccesspolicy> (last updated Dec. 8, 2021). And Shopify has aggressively enforced its policy of terminating Merchants who are the subject of

¹ See, e.g., List of Supporters: H.R. 3261, the *StopOnlinePiracyAct*, https://www.scribd.com/embeds/76259944/content?start_page=1&view_mode=list&access_key=key-1nce8qxzhsyew1gncn6x (last visited Jan. 28, 2022).

repeat infringement notices. Indeed, less than 2 percent of the Shopify Merchants who have been targeted with Plaintiffs' takedown notices remain active on the platform today, amounting to less than 0.01 percent of all Shopify Merchants. And as a result, Plaintiffs' claims will fail as a matter of law once this litigation progresses to the point that the false allegations in the Complaint need no longer be taken as true.

A. What Shopify Is

Shopify is a leading global ecommerce company, providing trusted tools to start, grow, market, and manage a retail business of any size. Unlike online retailers and marketplaces like Amazon and eBay, Shopify supports the creation and growth of *other* independent businesses, providing an ecommerce platform for entrepreneurs, from brand new startups to enterprise businesses with global storefronts. With millions of Merchants who use Shopify's services, Shopify offers Merchants core tools to build and manage their independent day-to-day businesses from one centralized platform.

Shopify's core product is a software subscription service. Shopify's software enables Merchants to display, manage, and sell their products over various sales channels, including web and mobile storefronts, physical retail locations, pop-up shops, social media integration, native mobile apps, and buy buttons. Merchants can choose from a variety of plans based on the size and individualized needs of the Merchant. Tools the Merchants might opt to use include a storefront (an online store where Merchants can create web pages, upload blog posts, and sell products), a payment processing service, a secure checkout service, shipping resources, a point-of-sale app or hardware for brick-and-mortar or pop-up stores, a marketing platform (with support for blogs, search engine optimization, and campaign tools), and back-office resources (including analytics, reports, and support).

Merchants control their own businesses, including what, where, and how to sell their products or services to customers. Merchants can, but are not required to, register a custom, non-Shopify-specific domain name on the platform. Individual Merchants can choose to use as much, or as little, of the tools Shopify offers as they desire. The Merchants, not Shopify, make the decisions on how to use Shopify's software for their own unique business needs.

B. Shopify's Anti-Infringement Policies

While Shopify does not control its Merchants' products or their business decisions, Shopify is committed to respecting intellectual property rights, and vigorously enforces its policies accordingly. In order to access Shopify's software ecommerce platform, each Merchant must agree to Shopify's Terms of Service, including its Acceptable Use Policy. The Terms of Service² and Acceptable Use Policy expressly forbid Merchants from "offer[ing] goods or services, or post[ing] or upload[ing] Materials, that infringe on the copyright or trademarks of others." *Shopify Terms of Service*, ¶ 20 (DMCA Notice and Takedown Procedure), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version); *Shopify Acceptable Use Policy*, ¶ 6 (Intellectual Property), <https://www.shopify.com/legal/aup> (last updated Apr. 15, 2020). Shopify has a dedicated Trust & Safety team that is responsible for handling violations of Shopify's Acceptable Use Policy, including allegations of intellectual property infringement.

Shopify employs robust procedures for taking down copyright-infringing content in accordance with the DMCA, 17 U.S.C. § 512(c). The DMCA sets forth a specific process for addressing allegations of infringement, which Shopify follows. Account holders who believe their

² All cites to the Terms of Service in this Answer reflect the Terms of Service that were in effect as of the date of the filing of the Complaint. See *Shopify Terms of Service*, <https://www.shopify.com/legal/terms> (October 12, 2021 version). The Terms of Service were subsequently updated on January 21, 2022 in ways that are not material to Shopify's Answer.

intellectual property is being infringed by a Shopify Merchant can send a DMCA Takedown Notice or Trademark Infringement Notice using Shopify's easily accessible online form. *See Shopify Terms of Service* ¶ 20 (DMCA Notice and Takedown Procedure), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version); *Reporting Intellectual Property Infringement*, <https://help.shopify.com/en/legal/dmca#/login> (last visited Jan. 28, 2022). Rightsholders can choose to create a free login to send notices through that form, or they can choose to send a DMCA Takedown Notice to Shopify's designated DMCA agent via email or mail or a Trademark Infringement Notice via email. *See Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark> (last visited Jan. 28, 2022). Promptly upon receiving a complete DMCA Takedown Notice (that is, one that contains all information required by the DMCA), Shopify removes or disables access to the content or materials claimed to be infringing. *See* 17 U.S.C. § 512(c); *see also* *Shopify Terms of Service* ¶ 20 (DMCA Notice and Takedown Procedure), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version); *Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark#reporting-trademark-infringement> (last visited Jan. 28, 2022). Shopify does the same thing upon receiving a complete Trademark Infringement Notice. Shopify then sends a notice of takedown to the allegedly infringing Merchant. The Merchant can then either accept the takedown or submit a counter notice that asserts, under penalty of perjury, that the Merchant has a good faith belief that the material was removed or disabled by mistake or misidentification. *Id.* The original complainant then has 14 business days after Shopify receives the counter notice to seek a court order restraining the Merchant from engaging in infringing activity. In the event the complainant does not take such action, Shopify allows the Merchant to restore the material. *Id.* This process is precisely the one set forth by the DMCA. *See* 17 U.S.C. §§ 512(c), (g).

Furthermore, Shopify rigorously implements its repeat infringer policy by disabling and/or terminating the accounts of Merchants who have been repeatedly accused of offering copyright-infringing products for sale, in accordance with Section 512(i)(1)(a) of the DMCA. And Shopify does the same for Merchants who have been accused of trademark infringement.

The overwhelming majority of Shopify Merchants have never received a DMCA complaint or a trademark infringement complaint. Nonetheless, given the scale of Shopify's business, Shopify processes tens of thousands of copyright and trademark infringement notices annually, averaging over 56,000 copyright and trademark infringement takedown requests for allegedly infringing products over the last three years. Consistent with its policies, Shopify promptly and appropriately responds to the notices it receives, disabling infringing content, and removing repeat infringers from its platform, as the circumstances require.

C. Shopify's More-Than-Diligent Responses To Plaintiffs' Infringement Notices

Contrary to Plaintiffs' false allegations in their Complaint, Shopify has swiftly responded to Plaintiffs' notices of infringement, taken down vast quantities of allegedly infringing materials, and terminated repeat bad actors. This has been no small feat. Plaintiffs have collectively submitted more than 5,000 DMCA takedown requests or trademark infringement notices to Shopify for individual shops. Together, those notices contain tens of thousands of unique URLs identifying allegedly copyrighted works and trademarks that Plaintiffs claim to own,³ including at least some of the 3,406 copyrighted works ("Works") and 20 trademarks ("Marks") identified in

³ There is a significant question whether Plaintiffs do indeed own the rights they are suing to enforce, which Shopify will explore through discovery. *See, e.g.*, Compl. ¶ 22. In the academic publishing industry, some companies have historically sought assignments of copyrights from the individual professors who have authored textbooks, rather than the universities that employ them (as the law requires for copyrighted works created by employees within the scope of their employment). It remains to be seen whether these particular publishers in fact took "assignments" of copyrights from individuals who never owned them in the first place.

Exhibits A and B to the Complaint. Plaintiffs often include hundreds of different URLs across numerous different shops within a single notice, requiring additional processing to disaggregate (which Shopify does). Scale notwithstanding, Shopify has diligently processed these notices.

Specifically, Shopify has reviewed more than 50,000 unique noticed URLs involving more than 1,750 Merchants submitted by Plaintiffs between October 2018 and January 2022. To date, more than 90 percent of those unique URL reviews have resulted in a takedown. Over 95 percent of those takedowns took place within five business days after the notice was processed by Shopify's internal ticketing system. And over two-thirds of those takedowns took place within one business day after the notice was uploaded. Of those Merchants Plaintiffs have noticed, fewer than two percent remain active on Shopify's platform today; the overwhelming majority of the remainder have been terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy. The merchants identified in Plaintiffs' Complaint, *see* Compl. ¶¶ 62, 65, are illustrative: nearly every single one has been terminated.

With respect to allegations of delays and repeat notices, Plaintiffs leave out related details of their conduct and Shopify's responses. It is true that, in a small fraction of instances, Plaintiffs' takedown requests have been incomplete and have not contained the appropriate information that would enable Shopify to act. In the majority of those cases, Shopify has reached out to Plaintiffs to request additional information, but has often been met with resistance or silence. For example, take Plaintiffs' allegation that they sent five notices containing the same URL for two different works, and that Shopify "ignored" the first four notices. *See* Compl. ¶¶ 67-68. Of the five notices identified by Plaintiffs, the first two were incomplete or improperly submitted. When Shopify reached out to Plaintiffs requesting additional action, Plaintiffs refused or otherwise failed to respond. Nearly a year later, Plaintiffs submitted two more notices within a single week for

unknown reasons. These notices were processed together, and the infringing content was removed. Plaintiffs later retracted their notice with respect to at least 30 unique URLs identified in these notices. Plaintiffs submitted the fifth notice nine months later. Once again, the infringing content was removed, and the Merchant's account was terminated.

Simply put, Shopify is committed to protecting the interests of rightsholders and platform Merchants alike, striking the balance by applying precisely the process provided in the DMCA. That Plaintiffs find that process insufficient is a complaint for Congress, not this Court.

* * *

Shopify regrets that, under these circumstances, the Plaintiffs have burdened the Court with this lawsuit. While no defendant ever relishes the prospect of litigation, Shopify does look forward to the opportunity to letting the true facts be known, and to vindicate its reputation as a responsible and trusted actor in the complex ecosystem of digital commerce. Lawsuits like this one are the reason Congress provided for awards of attorneys' fees to prevailing copyright litigation defendants in appropriate circumstances. *See, e.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016) (clarifying the operative standard for the award of such fees).

GENERAL DENIAL

Except as otherwise expressly stated herein, Shopify: (1) generally denies each and every allegation in the Complaint, including, without limitation, any allegations contained in the introduction, headings, subheadings, unnumbered Paragraphs, and footnotes; (2) denies liability to Plaintiffs; (3) specifically denies that it has caused Plaintiffs to suffer any harm, losses, or damages; and (4) declines to adopt or acknowledge as accurate any defined terms in the Complaint to the extent they constitute allegations directed at Shopify. Shopify reserves the right to challenge the authenticity of all sources and documents referred to in the Complaint, and to assert that any

of the sources or documents referred to by Plaintiffs in the Complaint are covered by attorney-client privilege, the work-product doctrine, and/or otherwise applicable privileges. Shopify reserves the right to seek to amend or supplement its Answer as may be necessary or appropriate.

RESPONSES TO SPECIFIC ALLEGATIONS

INTRODUCTION

1. To the extent that the allegations in Paragraph 1 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the Publishers, and on that basis denies those allegations. Shopify admits that it provides its Merchants with a wide range of e-commerce solutions. Shopify further admits that it provides its Merchants with an online toolbox that may include tools that can generally be described as storefront building, webhosting, product fulfillment, marketing, customer support, business expertise, business analytics, capital investment, and payment processing. Shopify states that the description of the toolbox as “complete” is vague and ambiguous, and accordingly denies this allegation. Shopify further denies that each of these tools is available for all of its Merchants, as some of these tools or aspects thereof are only available as additional “opt-ins” for eligible Merchants, or offered by various partners. Shopify further denies that it provides all of these tools directly to its Merchants. For example, Shopify does not market on behalf of its Merchants, nor provide the payment processing services for its Merchants. Shopify also does not provide customer support on behalf of its Merchants. Shopify denies all remaining allegations in Paragraph 1.

2. To the extent that the allegations in Paragraph 2 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 2.

3. Shopify admits that its President, in a May 4, 2021 interview, stated the following: “But also, it’s not just about what they’re selling. Copyright infringement [is] allowed on other platforms. If we see a store that is infringing on any type of intellectual property, either on a trademark or a copyright or anything of that nature, it’s gone. We don’t allow it. We notify the merchants and say, ‘Here’s the reason why we are taking these steps.’ And we give them a chance to explain or provide us proof that they actually do own the IP. But they can go elsewhere. It’s just, on Shopify, these are the stores that are permitted.” Nilay Patel, *How Shopify’s Network of Sellers Can Take On Amazon*, THE VERGE (May 4, 2021, 9:30 AM EDT), <https://www.theverge.com/22417825/shopify-harley-finkelstein-interview-online-shopping-amazon-apple>. Shopify denies all remaining allegations in Paragraph 3.

4. To the extent that the allegations in Paragraph 4 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 4.

5. Shopify admits that it has a Trust & Safety team⁴ that is responsible for handling violations of Shopify’s Acceptable Use Policy, including allegations of intellectual property infringement. Shopify further admits that its Acceptable Use Policy states that Merchants “may not offer goods or service, or post or upload Materials, that infringe on the copyright or trademarks of others.” *See Shopify Acceptable Use Policy* ¶ 6, <https://www.shopify.com/legal/aup> (last updated Apr. 15, 2020). Shopify denies all remaining allegations in Paragraph 5.

6. To the extent the allegations in Paragraph 6 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a

⁴ Plaintiffs misidentify the Trust and Safety team as the “Trust and Security” team in the Complaint.

belief as to the truth of the allegations regarding the Plaintiffs and/or their authorized agents, and on that basis, denies those allegations. Shopify admits that it has received some notices from Plaintiffs and/or individuals purporting to act on Plaintiffs' behalf, and that these notices identify allegedly infringing Works. Shopify denies that the notices that it has received from Plaintiffs and/or their authorized agents identify in all instances specific Merchants by store name and store URL. Shopify further lacks information sufficient to inform a belief as to the truth of the allegations regarding whether the works identified in the notices are infringing or whether the Merchants selling the allegedly infringing works were authorized to sell the works, and on that basis, denies those allegations. Shopify denies that the defined terms "Notices," "Pirated Websites," and "Pirated Subscribers" are accurate.⁵ Shopify denies all remaining allegations in Paragraph 6.

7. To the extent the allegations in Paragraph 7 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 7.

JURISDICTION AND VENUE

8. To the extent the allegations in Paragraph 8 contain legal conclusions, no response is required. Shopify admits that Plaintiffs' claims, as stated, appear to arise under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, as amended, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*, as amended, and that the Court has subject matter jurisdiction over claims arising under the Copyright Act and Lanham Act pursuant to 28 U.S.C. §§ 1331, 1338(a), and 15 U.S.C. § 1121(a). Shopify otherwise denies the allegations in Paragraph 8.

9. To the extent Paragraph 9 contains legal conclusions, no response is required. To

⁵ Without waiving Shopify's objections to any defined term in Plaintiffs' Complaint, to the extent Shopify uses any of Plaintiffs' defined terms in the Answer, Shopify does so for the sole purpose of responding to the allegations in the Complaint.

the extent a response is required, Shopify denies the allegations in Paragraph 9.

10. To the extent paragraph 10 contains legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 10.

11. The allegations in Paragraph 11 contain legal conclusions, to which no response is required. To the extent a response is required, Shopify admits that it does business in the United States. Shopify otherwise denies all remaining allegations in Paragraph 11.

- a. Shopify admits the allegations in Paragraph 11(a).
- b. Shopify admits that in a December 16, 2020 interview, its co-founder and CEO, Tobi Lütke, stated that “Shopify was a company initially for American consumers, built by German founders, in Canada.” Sriram Krishnan, *Tobi Lütke*, THE OBSERVER EFFECT (Dec. 16, 2020), <https://www.theobservereffect.org/tobi.html>. Shopify denies all remaining allegations in Paragraph 11(b).
- c. Shopify admits that it announced that most of its workforce will primarily work remotely on a permanent basis. Shopify denies all remaining allegations in Paragraph 11(c).
- d. Shopify admits that it is advised by U.S. lawyers who are active members of various bars in the United States, and that its General Counsel is located in Washington, D.C. Shopify denies all remaining allegations in Paragraph 11(d).
- e. Shopify admits that on or around July 19, 2021, Shopify filed a Lobbying Report that identified the specific lobbying issues for which Shopify had expended funds in 2021: “Advocacy on issues related to the growth of

independent small businesses in the digital economy”; “Advocacy on issues related to combating online sale of counterfeit goods”; and “Advocacy on issues related to the reform of laws relating to the protection of intellectual property (IP) rights.” *See*

[https://lda.senate.gov/filings/public/filing/48ea0f79-e3a7-41ad-9764-](https://lda.senate.gov/filings/public/filing/48ea0f79-e3a7-41ad-9764-9d1bf4a4c270/print/)

[9d1bf4a4c270/print/](https://lda.senate.gov/filings/public/filing/48ea0f79-e3a7-41ad-9764-9d1bf4a4c270/print/). Shopify denies all remaining allegations in Paragraph 11(e).

- f. Shopify denies the allegations in Paragraph 11(f).
- g. Shopify admits that its February 17, 2021 securities filing states that as of December 31, 2020, its Merchants were geographically dispersed as follows: “56% North America (50% in the United States and 6% in Canada), 25% Europe Middle East and Africa (8% in the United Kingdom), 15% Asia Pacific, Australia and China (6% in Australia) and 4% in Latin America (Mexico and South America).” *See* Shopify Inc., S.E.C. Form 40-F Ex. 1.1, at 11 (Feb. 17, 2021), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001594805/c3898d01-52b6-4d9b-87dc-21744e8ba90d.pdf>. Shopify further admits that the filing contains a table that “presents total external revenues by geographic location, based on the location of the Company’s merchants,” in which 68.4% and 66.7% of external revenues originated in the United States based on the location of the Merchants in 2019 and 2020, respectively. *See id.*, Ex. 1.2, Shopify Consolidated Financial Statements (Dec. 31, 2020) at 41. Shopify further admits that the next highest geographic location, located in Europe Middle East and Africa, was 7.7% and 8.7% in 2019 and 2020,

respectively. *Id.* Shopify denies all remaining allegations in Paragraph 11(g).

- h. Shopify admits that it has commercial relationships with some U.S. companies, including Google, Microsoft, and Stripe. Shopify denies all remaining allegations in Paragraph 11(h).
- i. Shopify admits that its Merchants can run campaigns through Facebook, Instagram, and other social media, including by using an app available for Shopify's platform. Shopify otherwise denies the allegations in Paragraph 11(i).
- j. Shopify admits that there is a physical location in the United States where Merchants can make in-person appointments for customer support, book a service, attend workshops and events, and explore the community. Shopify further admits that it has at least three subsidiaries incorporated in the United States, including Shopify LLC, Shopify Holdings (USA), Inc., and Shopify Payments (USA), Inc. Shopify further admits that Shopify Payments (USA) Inc. handles payment processing for some U.S. Merchants who are located in the United States and use Shopify Payments. Shopify denies all remaining allegations in Paragraph 11(j).

12. To the extent Paragraph 12 contains legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 12.

13. To the extent the allegations in Paragraph 13 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies that venue is proper under 28 U.S.C. §§ 1391(b) and 1400(a) for the reasons alleged, but nevertheless consents to the venue in this District. To the extent any factual allegations exist, Shopify denies all factual allegations in

Paragraph 13.

THE PARTIES

14. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and on that basis, denies the allegations in Paragraph 14.

15. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and on that basis, denies the allegations in Paragraph 15.

16. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 16, and on that basis, denies the allegations in Paragraph 16.

17. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 17, and on that basis, denies the allegations in Paragraph 17.

18. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 18, and on that basis, denies the allegations in Paragraph 18.

19. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 19, and on that basis, denies the allegations in Paragraph 19.

20. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 20, and on that basis, denies the allegations in Paragraph 20.

21. Admitted.

**PLAINTIFFS' COPYRIGHTS AND TRADEMARKS
AND THEIR BUSINESSES**

22. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 22, and on that basis denies the allegations in Paragraph 22.

23. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 23, and on that basis denies the allegations in Paragraph 23.

24. Shopify lacks information sufficient to form a belief as to the truth of the allegations

in Paragraph 24, and on that basis denies the allegations in Paragraph 24.

25. Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 25, and on that basis denies the allegations in Paragraph 25.

26. To the extent the allegations in Paragraph 26 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 26, and on that basis denies the allegations in Paragraph 26.

27. To the extent the allegations in Paragraph 27 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 27, and on that basis, denies the allegations in Paragraph 27.

28. To the extent the allegations in Paragraph 28 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 28, and on that basis, denies the allegations in Paragraph 28.

SHOPIFY AND ITS INFRINGING ACTIVITIES

29. Shopify admits that it is a paid subscription ecommerce service, and that it enables Merchants to set up online stores. Shopify further admits that it provides Merchants with a platform and a number of tools from which Merchants can choose. Such tools may, but may not always, include an online storefront, a payment processor, a front and back office, a customer service team for its Merchants, and limited marketing tools. Shopify denies that it provides payment processing or marketing services for its Merchants directly. Shopify denies all remaining allegations in Paragraph 29.

30. Shopify admits that its website contains the following phrases: “The platform commerce is built on”; and “Create an ecommerce website backed by powerful tools that help you find customers, drive sales, and manage your day-to-day.” *Shopify*, <https://www.shopify.com> (last visited Jan. 28, 2022). Shopify further admits that its website contains the following phrases: “Shopify gives you everything you need to run a successful online store”; “Start an online retail business today”; and “Just \$1 a day”. *Shopify Tour*, <https://www.shopify.com/tour> (last visited Jan. 28, 2022). Shopify denies all remaining allegations in Paragraph 30.

31. To the extent that the allegations in Paragraph 31 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it provides its Merchants with a platform that contains a number of tools that assist Merchants in managing products and inventory, processing orders and payments, fulfilling and delivering orders, connecting with customers, and leveraging analytics and reporting. Shopify denies that it directly provides payment processing, order fulfillment, or delivery services for its Merchants, or that its platform is “comprehensive,” a term that is vague and ambiguous. Shopify denies all remaining allegations in Paragraph 31.

32. To the extent that the allegations in Paragraph 32 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that Shopify offers website-building tools and templates that enable its Merchants to create online stores. Shopify further admits that it has a content management system to assist its Merchants in developing and displaying product pages. Shopify admits that it provides marketing tools, search engine optimization, online advertising assistance, analytics, reporting, and other tools. Shopify further admits that it provides tools that enable Merchants to process orders and payment processing services, including Shopify Payments and third-party payment gateways. Shopify further admits

that it offers customer support to its Merchants, including one-on-one communications. Shopify denies that all of these tools are available to each Merchant, or that Shopify provides payment processing services or order processing directly to the Merchants. Shopify denies all remaining allegations in Paragraph 32.

33. To the extent that the allegations in Paragraph 33 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that its website states the following: “Unlimited web hosting, worldwide”; “Secure hosting included with every plan”. *Shopify Website Hosting*, <https://www.shopify.com/website/hosting> (last visited Jan. 28, 2022). Shopify further admits that its website states the following: “Nothing to set up”; “We set up and host your ecommerce website and also take care of all software upgrades.” *Shopify Ecommerce Hosting*, <https://www.shopify.com/tour/ecommerce-hosting> (last visited Jan. 28, 2022). Shopify further admits that Merchant websites may contain administrator, dashboard, content delivery, reporting, checkout, and other functions. Shopify denies all remaining allegations in Paragraph 33.

34. To the extent that the allegations in Paragraph 34 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it provides books as an example of a type of product Merchants can sell. *Shopify Examples*, <https://www.shopify.com/examples> (last visited Jan. 28, 2022). Shopify further admits that its website contains a blog post that, in suggesting how Merchants can create their own educational content, states that digital products, such as “educational products like ebooks and online courses” are in demand. Braveen Kumar, *The Most Profitable Digital Products to Sell in 2021 (and How to Promote Them)*, SHOPIFY BLOG (Feb. 17, 2021), <https://www.shopify.com/blog/digital-products#2>. Shopify further admits that its website contains a blog post that states the following

with respect to “benefits of selling digital products”: “There’s no limit to how many products you can sell. No inventory. No manufacturers. No shipping or logistics. Just market the products. When a customer purchases a digital product, it’s delivered instantly, without your help.” Michael Keenan, *Want to Make Money Online? Here Are 25 Easy Ways to Earn Money Online*, SHOPIFY BLOG (Jan. 1, 2022), <https://www.shopify.com/blog/make-money-online>. Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding whether the alleged Pirate Subscribers were authorized to copy or sell digital copies of the Publishers’ textbooks, test banks, and ISMs, and on that basis, denies those allegations. Shopify denies all remaining allegations in Paragraph 34.

35. To the extent that the allegations in Paragraph 35 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the content of PDF copies of the Publishers’ textbooks, including how the Publishers protect their works, and on that basis denies those allegations. Shopify further lacks information sufficient to form a belief as to the truth of the allegations regarding whether the alleged Pirate Subscribers unlawfully circumvent protections placed on ebooks, and on that basis denies those allegations. Shopify otherwise denies all remaining allegations in Paragraph 35.

36. Shopify admits that its website states the following under its Terms of Service, Paragraph 20, DMCA Notice and Takedown Procedure:

Shopify supports the protection of intellectual property and asks Shopify merchants to do the same. It’s our policy to respond to all notices of alleged copyright infringement. If someone believes that one of our merchants is infringing their intellectual property rights, they can send a DMCA Notice to Shopify’s designated agent using our form. Upon receiving a DMCA Notice, we may remove or disable access to the Materials claimed to be a copyright infringement. Once provided with a notice of takedown, the merchant can reply with a counter notification using our form if they object to the complaint. The original complainant has 14 business days

after we receive a counter notification to seek a court order restraining the merchant from engaging in the infringing activity, otherwise we restore the material. For more information, see our DMCA Notice and Takedown Procedure.

WHICH MEANS

Shopify respects intellectual property rights and you should too. If we receive a DMCA Notice, we may disable access or remove the allegedly infringing content from your website. If you don't think the claim is valid, you can proceed with a counter notification.

If you believe one of our merchants is infringing your intellectual property rights, you can send Shopify a DMCA Notice. We will expeditiously disable access or remove the content and notify the merchant.

Shopify Terms of Service ¶ 20 (DMCA Notice and Takedown Procedure), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version) (emphasis in original). Shopify denies all remaining allegations in Paragraph 36.

37. To the extent that the allegations in Paragraph 37 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 37.

Pirate Subscribers on Shopify

38. To the extent that the allegations in Paragraph 38 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the objective of the alleged Pirate Websites, or whether the owners of those websites are authorized to reproduce or distribute digital copies of the Publishers' textbooks, test banks, or ISMs, including the Works, or use the Marks in any way, and on that basis denies those allegations. Shopify denies all remaining allegations in Paragraph 38.

39. To the extent that the allegations in Paragraph 39 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to

form a belief as to the truth of the allegations regarding whether the alleged Pirate Websites are highly interactive, how purchasers or prospective purchasers can interact with the alleged Pirate Websites, or whether the alleged Pirate Websites receive “a significant number of visitors,” a term that is vague and ambiguous, and on that basis denies those allegations. Shopify denies all remaining allegations in Paragraph 39.

40. To the extent that the allegations in Paragraph 40 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the design or content of the product pages on the alleged Pirate Websites or the Shopify tools used by the alleged Pirate Subscribers, and on that basis denies those allegations. Shopify admits that its website states the following: “Add product images”; “Upload your product images. No need to worry about resizing or optimization—we do that for you.” *Shopify Ecommerce Website*, <https://www.shopify.com/tour/ecommerce-website> (last visited Jan. 28, 2022). Shopify denies all remaining allegations in Paragraph 40.

41. To the extent that the allegations in Paragraph 41 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the alleged Pirate Subscriber’s use of Shopify’s tools, or the content of the alleged Pirate Websites, and on that basis denies those allegations. Shopify denies all remaining allegations in Paragraph 41.

42. To the extent that the allegations in Paragraph 42 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 42, and on that basis denies the allegations in Paragraph 42.

43. To the extent that the allegations in Paragraph 43 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding whether the alleged Pirate Subscribers copied, uploaded, sold, or distributed digital copies of the Works illegally or illegally used the Marks, and on that basis denies those allegations. Shopify admits that it received notices alleging copyright and trademark infringement regarding some of the alleged Pirate Subscribers. Shopify denies all remaining allegations in Paragraph 43.

44. To the extent that the allegations in Paragraph 44 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that some of its Merchants pay transaction fees, which may include a percentage of that Merchant's sales. Shopify denies all remaining allegations in Paragraph 44.

45. To the extent that the allegations in Paragraph 45 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 45, and on that basis denies the allegations in Paragraph 45.

46. To the extent that the allegations in Paragraph 46 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 46, and on that basis denies the allegations in Paragraph 46.

47. To the extent that the allegations in Paragraph 47 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 47, and on that basis denies the allegations in Paragraph 47.

Shopify Obstructs Submission of Infringement Notices

48. Shopify denies the allegations in Paragraph 48.

49. To the extent that the allegations in Paragraph 49 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 49.

50. To the extent that the allegations in Paragraph 50 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies all remaining allegations in Paragraph 50.

51. Shopify admits that its homepage does not contain the email address of Shopify's designated DMCA agent. Shopify denies that the email address of its designated DMCA agent is not located in a place that is reasonably accessible to the public. Shopify's designated DMCA agent is listed on a page titled "Copyright and Trademark" in the Shopify Help Center, which is reasonably accessible to the public. *See Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark> (last visited Jan. 28, 2022). Shopify denies all remaining allegations in Paragraph 51.

52. Shopify admits that its homepage contains hyperlinks to Shopify's Terms of Service and a "Sitemap," which contains hyperlinks to various pages on Shopify's site. *Shopify*, <https://www.shopify.com> (last visited Jan. 28, 2022). Shopify further admits that the email address of Shopify's designated agent is not listed on either page. However, the Terms of Service page contains a paragraph labeled "DMCA Notice and Takedown Procedure." *Shopify Terms of Service* ¶ 20 (DMCA Notice and Takedown Procedure), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version). This paragraph contains a direct hyperlink to Shopify's DMCA Notice and Takedown Procedure, which is an online form for complainants who have a Shopify account or

choose to create a free login. *See id.*; *Reporting Intellectual Property Infringement*, <https://help.shopify.com/en/legal/dmca#/login> (last visited Jan. 28, 2022). The form is also linked on Shopify's Legal page. *Legal*, <https://www.shopify.com/legal> (last visited Jan. 28, 2022). For complainants who do not have a Shopify account or do not wish to create a free login, Shopify lists both Shopify's DMCA agent addresses for submission by mail or email and detailed instructions for the information required for a DMCA notice in Shopify's Help Center. *See Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark> (last visited Jan. 28, 2022).

53. Shopify admits that the Terms of Service hyperlinks to an online form where complainants can report intellectual property infringement. Shopify further admits that to access and submit the form, complainants must create a free login. Shopify denies all remaining allegations in Paragraph 53. While submitting the online form is the most efficient way of submitting a copyright infringement notice, complainants are not required to do so. For complainants who choose not to create a free login, they can send a notice that has all of the information required in the DMCA to Shopify's designated agent, for which addresses are provided. *See Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark> (last visited Jan. 28, 2022).

54. Shopify admits that the contact information for its designated DMCA agent is listed on a page titled "Copyright and Trademark" in the Shopify Help Center. *See Copyright and Trademark*, <https://help.shopify.com/en/manual/your-account/copyright-and-trademark> (last visited Jan. 28, 2022). Shopify denies that the method described in Paragraph 54 is the only way to find Shopify's designated DMCA agent, or that the location of its DMCA agent on its website is improper, and on that basis, denies all remaining allegations in Paragraph 54.

55. Shopify denies the allegations in Paragraph 55.

Plaintiffs' Infringement Notices to Shopify

56. To the extent that the allegations in Paragraph 56 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that in certain appropriate circumstances, Shopify may not remove or disable access to allegedly infringing files. Shopify denies all remaining allegations in Paragraph 56.

57. To the extent that the allegations in Paragraph 57 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it has received notices relating to the Works and Marks between 2017 and 2021, and that some of these notices contain URLs linking to allegedly infringing works. Shopify further admits that some of the notices identify a website and a location on the website where the allegedly infringing Works or Marks were located. Shopify denies all remaining allegations in Paragraph 57.

58. To the extent that the allegations in Paragraph 58 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 58, and on that basis, denies the allegations in Paragraph 58.

59. To the extent that the allegations in Paragraph 59 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that some notices submitted by Plaintiffs identified allegedly infringing content and contained URLs in some instances. Shopify further admits that some notices submitted by Plaintiffs also contained information for Shopify to contact the complaining party, including an email address, telephone number, and physical address. Shopify further admits that some of the notices submitted by Plaintiffs contained a statement that the complaining party had a good faith belief that use of the

content in the matter complained of was not authorized by the copyright or trademark owner, its agent, or the law. Shopify denies all remaining allegations in Paragraph 59.

60. To the extent that the allegations in Paragraph 60 contain legal conclusions, no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding whether the notices concerned infringing activity on Shopify by alleged Pirate Subscribers via alleged Pirate Websites, including whether the reproduction, sale, and distribution of digital copies of the Works or use of the Marks was unauthorized in connection with the advertising, sale, offering for sale, and distribution of the Works, and on that basis denies those allegations. Shopify denies all remaining allegations in Paragraph 60.

61. To the extent that the allegations in Paragraph 61 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it maintains confidential business records related to its Merchants. Shopify further admits that it can communicate directly with its Merchants. Shopify further admits that, in some instances, its tools may allow Shopify to determine whether a Merchant operates another shop using its services. Shopify further admits that Shopify's Terms of Service allow it to terminate a Merchant for violations of those Terms, including for copyright or trademark infringement. Shopify denies all remaining allegations in Paragraph 61.

62. To the extent that the allegations in Paragraph 62 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it received notices from Plaintiffs that have identified hundreds of works that are allegedly infringing. Shopify denies that it has not terminated the accounts of repeat infringers in appropriate circumstances; however, Shopify admits that for reasons it believes to be lawful, it has not terminated the account of every

Merchant for which it has ever received a notice of alleged infringement, as Shopify's repeat infringer policy outlines the specific procedures for termination under appropriate circumstances under Section 512(i)(1)(A) of the DMCA. Shopify lacks information sufficient to form a belief as to the truth of whether the notices identified in Paragraph 62 contain a representative list of URLs to infringing product pages through which the Works were sold and/or the Marks were used, and on that basis, denies those allegations. Shopify denies all remaining allegations in Paragraph 62.

- Shopify admits that it has received notices related to a Merchant with a website at *dexdwall.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.
- Shopify admits that it has received notices related to a Merchant with a website at *mosac.club*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy. Shopify further admits that it received notices related to a Merchant with a website at *atiso.club*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy. Shopify denies all remaining allegations in this subparagraph.
- Shopify admits that it has received notices related to a Merchant with a website at *panend.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.
- Shopify admits that it has received notices related to a Merchant with a website at *prolium.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.
- Shopify admits that it has received notices related to a Merchant with a website at *tys-cheap-audiobook.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.

- Shopify admits that it has received notices related to a Merchant with a website at *batches88.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.
- Shopify admits that it has received notices related to a Merchant with a website at *jedelstore.myshopify.com*. Shopify denies that it continues to provide services to this Merchant, as this Merchant was terminated in accordance with Shopify's Terms of Service and Acceptable Use Policy, and denies all remaining allegations in this subparagraph.

63. To the extent that the allegations in Paragraph 63 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 63.

64. To the extent that the allegations in Paragraph 64 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that it is notified of allegedly infringing activities through notices sent by various interested parties. Shopify denies all remaining allegations in Paragraph 64.

65. To the extent that the allegations in Paragraph 65 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that there have been websites operated by its Merchants at *emedbooks.com*, *emedbooks.net*, *emedbooks.myshopify.com*, and *emedbooks.org*. Shopify further admits that it has removed infringing works from at least one of these websites. Shopify further admits that at least some of the information and product listings appear to be similar between websites. Shopify denies all remaining allegations in Paragraph 65.

66. To the extent that the allegations in Paragraph 66 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies that it fails to act with respect to repeat infringers. Shopify further denies that it has failed to remove or disable access to the files of allegedly infringing Works, as specified in the Notices. Shopify lacks information

sufficient to form a belief as to the truth of the allegations regarding the content of unidentified notices, and on that basis, denies those allegations. Shopify denies all remaining allegations in Paragraph 66.

67. Shopify admits that it received notices for the work identified in Paragraph 67 on or around June 25, 2019, July 21, 2019, May 15 and 21, 2020, and February 17, 2021. Shopify denies all remaining allegations in Paragraph 67.

68. Shopify admits that it received notices for the work identified in Paragraph 68 on or around June 25, 2019, July 21, 2019, May 21 and 27, 2020, and February 17, 2021. Shopify denies all remaining allegations in Paragraph 68.

The Infringement and Repeat Infringers Are No Accident

69. To the extent that the allegations in Paragraph 69 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that to become a Shopify Merchant, Merchants sign up through the Shopify website, and must provide certain identifying information. Shopify further admits that new Merchants may sign up for a 14-day trial period for free, after which, Merchants must begin paying Shopify a monthly subscription fee to use Shopify's services. Shopify denies all remaining allegations in Paragraph 69.

70. To the extent that the allegations in Paragraph 70 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that all Merchants must agree to Shopify's Terms of Service, including Shopify's Acceptable Use Policy. Shopify further admits that Paragraph 5 (Shopify Rights) of its Terms of Service states, *inter alia*, the following:

[Shopify] may, but ha[s] no obligation to, remove Materials and suspend or terminate Accounts if we determine in our sole discretion that the goods or services offered via a Store, or the Materials uploaded or posted to a Store, violate [Shopify's] Acceptable Use Policy ("AUP") or these Terms of Service.

WHICH MEANS

[Shopify] can modify, cancel or refuse the service at anytime. . . .

Shopify Terms of Service ¶ 5.3 (Shopify Rights), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version) (emphasis in original). Shopify further admits that Paragraph 15 of its Terms of Service states, *inter alia*, the following:

We reserve the right to modify or terminate the Shopify Service, the Terms of Service and/or your Account for any reason, without notice at any time (unless otherwise required by applicable law). Termination of the Terms of Service shall be without prejudice to any rights or obligations which arose prior to the date of termination.

WHICH MEANS

To initiate a termination contact Support. Shopify will respond with specific information regarding the termination process for your account. Once termination is confirmed, domains purchased through Shopify will no longer be automatically renewed. If you cancel in the middle of your billing cycle, you'll have one last email invoice.

We may change or terminate your account at any time. Any fraud and we will suspend or terminate your account.

Id. ¶ 15.5 (Cancellation and Termination) (emphasis in original) (Oct. 12, 2021 version). Shopify further admits that Paragraph 20 of its Terms of Service states the following:

Shopify supports the protection of intellectual property and asks Shopify merchants to do the same. It's our policy to respond to all notices of alleged copyright infringement. If someone believes that one of our merchants is infringing their intellectual property rights, they can send a DMCA Notice to Shopify's designated agent using our form. Upon receiving a DMCA Notice, we may remove or disable access to the Materials claimed to be a copyright infringement. Once provided with a notice of takedown, the merchant can reply with a counter notification using our form if they object to the complaint. The original complainant has 14 business days after we receive a counter notification to seek a court order restraining the merchant from engaging in the infringing activity, otherwise we restore the material. For more information, see our DMCA Notice and Takedown Procedure.

WHICH MEANS

Shopify respects intellectual property rights and you should too. If we receive a DMCA Notice, we may disable access or remove the allegedly infringing content from your website. If you don't think the claim is valid, you can proceed with a counter notification.

If you believe one of our merchants is infringing your intellectual property rights, you can send Shopify a DMCA Notice. We will expeditiously disable access or remove the content and notify the merchant.

Id. ¶ 20 (DMCA Notice and Takedown Procedure) (emphasis in original) (Oct. 12, 2021 version).

Shopify denies all remaining allegations in Paragraph 70.

71. Shopify admits that its Acceptable Use Policy states the following: “You may not offer goods or services, or post or upload Materials, that infringe on the copyright or trademark of others.” *Shopify Acceptable Use Policy* ¶ 6 (Intellectual Property), <https://www.shopify.com/legal/aup> (last updated Apr. 15, 2020). Shopify further admits that its Trust & Safety team is responsible for handling violations of Shopify’s Acceptable Use Policy, including allegations of intellectual property infringement. Shopify does not provide legal advice to Merchants or other Shopify users. Shopify further admits that in an interview published May 4, 2021 on TheVerge.com, Harley Finkelstein, Shopify’s President, stated the following:

Well, the reason we have the acceptable use policy is so that we have very clear lines. So obviously, we firmly stand against anything relating to hate or violence. But we think that platform moderation is actually a critical part of any growing company, and certainly part of the digital landscape. So we have this team, they’re called Trust and Safety. And the entire team is dedicated to ensuring that our merchants follow the AUP, the acceptable use policy, and we don’t hesitate to enforce that.

NilayPatel, *How Shopify’s Network of Sellers Can Take On Amazon*, THE VERGE (May 4, 2021, 9:30 AM), <https://www.theverge.com/22417825/shopify-harley-finkelstein-interview-online-shopping-amazon-apple>. Shopify further admits that in the same interview, Finkelstein also engaged in the following exchange:

Our team is big enough that they can, like, it’s sufficiently staffed that they can do what they want. But also, a lot of it is based on machine learning and AI, whereby we know certain keywords or meta tags contravene the AUP, and they’re gone.

Id. Shopify denies that it actively monitors its entire platform, as the phrase “actively monitor” is vague and ambiguous. Shopify denies all remaining allegations in Paragraph 71.

72. To the extent that the allegations in Paragraph 72 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that under its Terms of Service, “Shopify shall have the non-exclusive right and license to use the names, trademarks, service marks and logos associated with your Store to promote the Service.” *Shopify Terms of Service* ¶ 9.4 (Intellectual Property and Customer Content), <https://www.shopify.com/legal/terms> (Oct. 12, 2021 version). Shopify denies all remaining allegations in Paragraph 72.

73. Shopify admits that its website states that Merchants “can sell ebooks [online] as long as you legally own the rights to the ebook(s) you’re selling.” Shopify Ebooks, <https://www.shopify.com/sell/ebooks> (last visited Jan. 28, 2022). Shopify further admits that its website states the following: “Get all the training and tools you need to start your ebook business”; and “Shopify is an excellent ecommerce platform for selling ebooks and other digital products.” *Id.* Shopify denies all remaining allegations in Paragraph 73.

74. To the extent that the allegations in Paragraph 74 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 74.

75. To the extent that the allegations in Paragraph 75 contain legal conclusions, no response is required. To the extent a response is required, Shopify admits that in a section titled “Growth Strategy, Grow our Merchants’ Revenue,” a February 17, 2021 public securities filing states: “Our goals are closely aligned with the goals of our Merchants. The more a Merchant sells on our platform, the more revenue we generate as they process more transactions, upgrade plans, sell through new sales channels, ship more products, and use additional solutions.” Shopify Inc., S.E.C. Form 40-F Ex. 1.1, at 17 (Feb. 17, 2021), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001594805/c3898d01-52b6-4d9b-87dc-21744e8ba90d.pdf>. Shopify denies all remaining

allegations in Paragraph 75.

76. Shopify admits that it receives revenue from “subscription solutions” and “merchant solutions.” Shopify further admits that its “subscription solutions” offers several different monthly subscription plans for Merchants, and each plan contains different features. Shopify further admits that some of its subscription plans have a variable component that is based on a Merchant’s volume of sales. Shopify denies all remaining allegations in Paragraph 76.

77. Shopify admits that its “merchant solutions” are primarily generated from payment processing fees and other transaction fees, referral fees from partners, advertising revenue on the Shopify App Store, Shopify Capital, Shop Pay Installments, Shopify Shipping, Shopify Fulfillment Network, the sale of POS hardware and collaborative warehouse fulfillment solutions, and Shopify Email. *See* Shopify Inc., *S.E.C. Form 40-F*, Ex. 1.1, at 14 (Feb. 17, 2021), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001594805/c3898d01-52b6-4d9b-87dc-21744e8ba90d.pdf>. Shopify further admits that some of its “merchant solutions” are transaction-based, and may include non-recurring fees or charges. Shopify further admits that these transaction-based fees or charges vary based on a Merchant’s subscription plan and the method of payment. Shopify denies all remaining allegations in Paragraph 77.

78. To the extent that the allegations in Paragraph 78 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 78.

79. To the extent that the allegations in Paragraph 79 contain legal conclusions, no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 79.

80. To the extent that the allegations in Paragraph 80 contain legal conclusions, no

response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations regarding the Publishers' other lawsuits, including the details of alleged temporary restraining orders, and on that basis, denies those allegations. Shopify admits that it has received requests for certain information about its Merchants, and Shopify complies with court orders in accordance with applicable law, regulations, and its Government Access Policy. *See Guidelines for Legal Requests for Information*, <https://www.shopify.com/legal/gvtaccesspolicy> (last updated Dec. 8, 2021). Shopify denies all remaining allegations in Paragraph 80.

CLAIMS FOR RELIEF

Count I – Contributory Copyright Infringement Asserted by the Publishers

81. Shopify incorporates by reference and restates its responses to Paragraphs 1 through 80 as set forth above.

82. The allegations in Paragraph 82 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 82, and on that basis, denies the allegations in Paragraph 82.

83. The allegations in Paragraph 83 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 83, and on that basis, denies the allegations in Paragraph 83.

84. The allegations in Paragraph 84 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 84.

85. The allegations in Paragraph 85 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 85.

86. The allegations in Paragraph 86 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 86.

87. The allegations in Paragraph 87 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 87.

**Count II – Vicarious Copyright Infringement
Asserted by the Publishers**

88. Shopify incorporates by reference and restates its responses to Paragraphs 1 through 87 as set forth above.

89. The allegations in Paragraph 89 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 89, and on that basis, denies the allegations in Paragraph 89.

90. The allegations in Paragraph 90 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 90, and on that basis, denies the allegations in Paragraph 90.

91. The allegations in Paragraph 91 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 91.

92. The allegations in Paragraph 92 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 92.

93. The allegations in Paragraph 93 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 93.

94. The allegations in Paragraph 94 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 94.

**Count III – Contributory Trademark Infringement
Asserted by the Trademark Plaintiffs**

95. Shopify incorporates by reference and restates its responses to Paragraphs 1 through 94 as set forth above.

96. The allegations in Paragraph 96 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 96, and on that basis, denies the allegations in Paragraph 96.

97. The allegations in Paragraph 97 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 97, and on that basis, denies the allegations in Paragraph 97.

98. The allegations in Paragraph 98 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 98.

99. The allegations in Paragraph 99 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify lacks information sufficient to form a belief as to the truth of the allegations in Paragraph 99, and on that basis, denies the allegations in Paragraph 99.

100. The allegations in Paragraph 100 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 100.

101. The allegations in Paragraph 101 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 101.

102. The allegations in Paragraph 102 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 102.

103. The allegations in Paragraph 103 consist of legal conclusions, to which no response is required. To the extent a response is required, Shopify denies the allegations in Paragraph 103.

ANSWER TO PRAYER FOR RELIEF

Shopify denies that Plaintiffs are entitled to the relief sought in the Prayer for Relief or any other relief under any theory.

AFFIRMATIVE DEFENSES

Without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of Plaintiffs' claims, and without waiving and hereby expressly reserving the right to assert any and all such defenses at such time and to such extent as discovery and factual developments establish a basis thereof, Shopify asserts the following defenses:

FIRST DEFENSE

Plaintiffs' claims are barred because Plaintiffs do not own or hold the exclusive rights under 17 U.S.C. § 106 or any copyright law that were allegedly infringed by Shopify or Shopify's Merchants. To the extent the individual professors who authored the textbooks, and not the universities that employed those professors, granted an assignment of rights to the publishers, the assignments are invalid, as the universities, not the individual professors, are the owners of the copyrights at issue.

SECOND DEFENSE

The Digital Millennium Copyright Act's safe harbor (17 U.S.C. § 512) shields Shopify from monetary liability for content generated and/or uploaded by its Merchants.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, by equitable estoppel, waiver, *in pari delicto*, unclean hands, ratification, laches, and/or other related equitable doctrines.

FOURTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of copyright misuse.

FIFTH DEFENSE

Shopify did not engage in the volitional conduct required to be liable for direct infringement.

SIXTH DEFENSE

Shopify did not have the requisite knowledge, recklessness, or intent required to be liable for contributory infringement.

SEVENTH DEFENSE

Shopify did not have the requisite right and ability to supervise or the direct financial interest required to be liable for vicarious infringement.

EIGHTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

NINTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because certain of the works at issue are not registered in the United States as is required to pursue a claim for copyright infringement and are not exempt as foreign works.

TENTH DEFENSE

As to some or all of the Works or Marks in dispute, Shopify held an express or implied license.

ELEVENTH DEFENSE

There was no willful infringement by Shopify; accordingly, Plaintiffs' claims, including but not limited to the demand for enhanced damages, have no basis and should be denied.

TWELFTH DEFENSE

Plaintiffs failed to take reasonable action to minimize any damages allegedly sustained as a result of the facts alleged in the Complaint and are therefore barred from recovering any damages which might reasonably have been avoided.

THIRTEENTH DEFENSE

Plaintiffs have failed to name or join a necessary party or parties to the present action, including but not limited to certain persons or entities who may have rights or interests in the Works or Marks at issue.

FOURTEENTH DEFENSE

The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

FIFTEENTH DEFENSE

Each of the claims in the Complaint, in whole or in part, is barred because there is no causal relationship between Plaintiffs' alleged losses, if any, and any alleged wrongful acts or omissions by Shopify.

SIXTEENTH DEFENSE

Some or all of the allegedly infringing acts committed by Shopify or Shopify's Merchants constitute fair use.

SEVENTEENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Shopify's Merchants have the rights necessary to use the works at issue in Plaintiffs' claims.

EIGHTEENTH DEFENSE

Plaintiffs' claims, in whole or in part, are barred by the doctrine of abandonment.

NINETEENTH DEFENSE

Plaintiffs' claims, in whole or in part, are barred by the doctrine of waiver.

TWENTIETH DEFENSE

Plaintiffs' claims, in whole or in part, are barred because Plaintiffs have suffered no provable injury as a result of Shopify's alleged conduct.

TWENTY-FIRST DEFENSE

The injunctive relief sought by Plaintiffs is barred, in whole or in part, because Plaintiffs have available an adequate remedy at law for any alleged damages they have suffered.

TWENTY-SECOND DEFENSE

Each of the claims in the Complaint, in whole or in part, is barred by the election of remedies doctrine because Plaintiffs seek mutually inconsistent remedies in their causes of action.

TWENTY-THIRD DEFENSE

As to some or all of the claims in dispute, Shopify has been granted a release, as Plaintiffs have retracted their claims of infringement as to at least some of the Works or Marks identified in the notices submitted by Plaintiffs.

TWENTY-FOURTH DEFENSE

Plaintiffs' claims are barred because the Works at issue are works-made-for-hire" as defined in 17 U.S.C. § 101 of the Copyright Act, and Plaintiffs therefore do now own any of the exclusive rights under 17 U.S.C. § 106 that were allegedly infringed by Shopify's Merchants.

ADDITIONAL DEFENSES

Shopify has not knowingly or intentionally waived any applicable defenses and reserves

the right to assert and rely on other applicable defenses as may become available or apparent during discovery in this matter. Shopify reserves the right to amend this Answer and/or its affirmative defenses.

* * *

WHEREFORE, SHOPIFY INC. prays as follows:

1. That Plaintiffs take nothing by this action;
2. That Shopify be awarded attorneys' fees and costs of this suit pursuant to 17 U.S.C. § 505; and
3. That Shopify be awarded such other relief as the Court deems just and proper.

Dated: January 28, 2022

Respectfully Submitted,

/s/ David L. Johnson

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