

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington Corporation,)	CASE NO. C17-0286 RSM
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S
)	MOTION TO EXPEDITE DISCOVERY
v.)	
)	
JOHN DOES 1-10 using IP address 173.10.29.66,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff alleges copyright and trademark infringement claims against several unknown John Doe Defendants that appear to be using IP address 173.10.29.66 to illegally activate Plaintiff's software. Dkt. #1 at ¶¶ 44-56. It now seeks permission to take limited, expedited discovery from Comcast Business Communications, LLC ("Comcast"), an internet service provider ("ISP"), to identify and name the John Doe Defendants in this case so that it can complete service of process and proceed with litigation. Dkt. #14 at 6-7. As further discussed below, Plaintiff has demonstrated that: (1) the John Doe Defendants are real people and/or entities that may be sued in federal court; (2) it has unsuccessfully attempted to identify the John Doe Defendants prior to filing this motion; (3) its claims against the John Doe Defendants would likely survive a motion to dismiss; and (4) there is a reasonable likelihood that service of

1 the proposed subpoena on Comcast will lead to information identifying the John Doe
2 Defendants. As a result, the Court finds that good cause exists to allow Microsoft to engage in
3 expedited, preliminary discovery.

4 **II. BACKGROUND¹**

5 Plaintiff develops, distributes, and licenses various types of computer software,
6 including operating system software (such as Microsoft Windows) and productivity software
7 (such as Microsoft Office). Dkt. #1 at ¶¶ 11–21. Microsoft holds registered copyrights in the
8 various different versions of these products, and has registered trademarks and service marks
9 associated with the products. *Id.* ¶ 22.
10

11 Microsoft has implemented a wide-range of initiatives to protect its customers and
12 combat theft of its intellectual property, including its product activation system, which involves
13 the activation of software through product keys. *Id.* ¶ 30. A Microsoft product key is a 25-
14 character alphanumeric string generated by Microsoft and provided either directly to
15 Microsoft’s customers or to Microsoft’s original equipment manufacturer (“OEM”) partners.
16 *Id.* ¶ 31. Generally, when customers or OEMs install Microsoft software on a device, they
17 must enter the product key. *Id.* Then, as part of the activation process, customers and/or
18 OEMs voluntarily contact Microsoft’s activation servers over the Internet and transmit the
19 product keys and other technical information about their device to the servers. *Id.* Because
20 Microsoft software is capable of being installed on an unlimited number of devices, Microsoft
21 uses the product activation process to detect piracy and protect consumers from the risk of non-
22 genuine software. *Id.* ¶ 32.
23
24
25

26
27 ¹ The following background is taken from Plaintiff’s Complaint and the Declaration of
28 Brittany Carmichael filed in support of Plaintiff’s Motion for Expedited Discovery. Dkts. #1
and #15.

1 Microsoft has created the Microsoft Cybercrime Center where they utilize, *inter alia*,
2 certain technology to detect software piracy, which it refers to as “cyberforensics.” Dkt. #1 at ¶
3 35. Microsoft uses its cyberforensics to analyze product key activation data voluntarily
4 provided by users when they activate Microsoft software, including the IP address from which
5 a given product key is activated. *Id.* ¶ 36. Cyberforensics allows Microsoft to analyze billions
6 of activations of Microsoft software and identify activation patterns and characteristics that
7 make it more likely than not that the IP address associated with certain product key activations
8 is one through which unauthorized copies of Microsoft software are being activated. Dkt. #15
9 at ¶ 2. Microsoft’s cyberforensics have identified a number of product key activations
10 originating from IP address 173.10.29.66. *Id.* at ¶ 4. According to publicly available data, that
11 IP address is presently under the control of Comcast. *Id.*
12
13

14 Microsoft alleges that for at least the past three years, the aforementioned IP address has
15 been used to activate hundreds of Microsoft product keys. *Id.* at ¶ 5. These activations have
16 characteristics that demonstrate that the John Doe Defendants are using the IP address to
17 activate unauthorized copies of Microsoft’s software. *Id.* Microsoft believes these activations
18 constitute the unauthorized copying, distribution, and use of Microsoft software, in violation of
19 Microsoft’s software licenses and intellectual property rights. *Id.* Despite its efforts, Microsoft
20 has been unable to positively identify the John Doe Defendants. *Id.* at ¶ 7. Microsoft believes
21 Comcast has access to the subscriber information associated with the IP address from records
22 kept in the regular course of its business. *Id.* at ¶ 9.
23
24

25 ///

26 ///

27 ///

III. DISUCSSION

A. Legal Standard

This Court may authorize early discovery before the Rule 26(f) conference for the parties' and witnesses' convenience and in the interests of justice. Fed. R. Civ. P. 26(d). Courts within the Ninth Circuit generally consider whether a plaintiff has shown "good cause" for such early discovery. *See, e.g., Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613-14 (D. Ariz. 2001) (collecting cases and standards). When the identities of defendants are not known before a Complaint is filed, a plaintiff "should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds." *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). In evaluating whether a plaintiff establishes good cause to learn the identity of John Doe defendants through early discovery, courts examine whether the plaintiff (1) identifies the John Doe defendant with sufficient specificity that the Court can determine that the defendant is a real person who can be sued in federal court, (2) recounts the steps taken to locate and identify the defendant, (3) demonstrates that the action can withstand a motion to dismiss, and (4) proves that the discovery is likely to lead to identifying information that will permit service of process. *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

B. Plaintiff Has Shown Good Cause to Take Early Discovery

Here, Plaintiff established good cause to engage in early discovery to identify the John Doe Defendants. First, Plaintiff has associated the John Doe Defendants with specific acts of activating unauthorized software using product keys that are known to have been stolen from Microsoft, and have been used more times than are authorized for the particular software. Dkt.

1 #15 at ¶¶ 4-6. Plaintiff has been able to trace the product key activations as originating from
2 one IP address, and nearly all of the activations have involved voluntary communication
3 between the John Doe Defendants and Microsoft activation servers in this judicial District. *Id.*
4 at ¶¶ 4-5. Second, Plaintiff has adequately described the steps it took in an effort to locate and
5 identify the John Doe Defendants. Dkt. #15. Specifically, it utilized its “cyberforensics”
6 technology to analyze “billions of activations of Microsoft software” and identified certain
7 patterns and characteristics which indicate software piracy. *Id.* at ¶¶ 2-3 and Dkt. #1 at ¶¶ 35-
8 38. Third, Plaintiff has pleaded the essential elements to state a claim for Copyright
9 Infringement under 17 U.S.C. § 501, *et seq.*, and Trademark Infringement under 15 U.S.C. §
10 1114. Dkt. #1 at ¶¶ 44-56 and Exs. 1-50. Fourth, the information proposed to be sought
11 through a Rule 45 subpoena appears likely to lead to identifying information that will allow
12 Plaintiff to effect service of process on the John Doe Defendants. Dkt. #14 at 6-9.
13 Specifically, Plaintiff states it will seek subscriber information associated with the alleged
14 infringing IP address. Dkt. #15 at ¶ 10.

15
16
17
18 Taken together, the Court finds that the foregoing factors demonstrate good cause to
19 grant Plaintiff’s motion for leave to conduct limited expedited discovery. *See Semitool*, 208
20 F.R.D. at 276. Therefore, the Court will grant discovery limited to documents and/or
21 information that will allow Plaintiff to determine the identities of the John Doe Defendants in
22 order to effect service of process.

23 24 **IV. CONCLUSION**

25 For the reasons set forth above, the Court hereby ORDERS:
26
27
28

