

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

IO GROUP, INC., d/b/a TITAN MEDIA,)	Case No. 10-4377 SC
a California corporation,)	
)	ORDER GRANTING REQUEST FOR
Plaintiff,)	LEAVE TO TAKE LIMITED EARLY
)	<u>DISCOVERY</u>
v.)	
)	
DOES 1-65, individuals,)	
)	
Defendants)	
)	
)	

I. INTRODUCTION

On September 28, 2010, Plaintiff Io Group, Inc., doing business as Titan Media ("Plaintiff"), filed a Complaint against sixty-five Doe Defendants for copyright infringement. ECF No. 1 ("Compl."). Plaintiff seeks leave to take limited discovery prior to the scheduled Rule 26 conference in order to identify the Doe Defendants. ECF No. 4 ("Request for Leave to Take Discovery").

II. BACKGROUND

Plaintiff produces, markets and distributes adult entertainment products. Compl. ¶ 2. Plaintiff alleges the Doe Defendants reproduced, distributed and publicly displayed its copyrighted materials through a peer-to-peer ("P2P") network called eDonkey2000. Id. ¶ 1. Plaintiff alleges Defendants used an

1 internet connection provided by Cox Communications to access the
2 internet for the purpose of engaging in the infringing activity.
3 Id. ¶ 4. Plaintiff seeks leave to serve a Rule 45 third-party
4 subpoena on Cox Communications.

5
6 **III. LEGAL STANDARD**

7 Generally, a party may not initiate discovery before the
8 parties have met and conferred pursuant to Federal Rule of Civil
9 Procedure 26(f). However, a court may authorize earlier discovery
10 "for the convenience of parties and witnesses and in the interests
11 of justice." Fed. R. Civ. P. 26(d). The requesting party must
12 demonstrate good cause for earlier discovery. See Semitool, Inc.
13 v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002).

14 According to the Ninth Circuit:

15 [W]here the identity of alleged defendants will
16 not be known prior to the filing of a
17 complaint[,] . . . the plaintiff should be
18 given an opportunity through discovery to
19 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.

20 Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). For
21 leave to conduct discovery to identify a Doe defendant, the moving
22 party must: (1) identify the defendant with enough specificity to
23 allow the Court to determine whether the defendant is a real person
24 or entity who could be sued in federal court; (2) recount the steps
25 taken to locate the defendant; (3) show that its action could
26 survive a motion to dismiss; and (4) file a request for discovery
27 with the Court identifying the persons or entities on whom
28 discovery process might be served and for which there is a

1 reasonable likelihood that the discovery process will lead to
2 identifying information. Columbia Ins. Co. v. seescandy.com, 185
3 F.R.D. 573, 578-80 (N.D. Cal. 1999).

4
5 **IV. DISCUSSION**

6 Plaintiff engaged Media Protector International GmbH ("Media
7 Protector") to locate infringing copies of its works on the P2P
8 network eDonkey2000. Eichner Decl. ¶ 2.¹ Individuals access the
9 internet through an internet service provider ("ISP"), and each
10 time the subscriber accesses the internet, the ISP provides a
11 unique number to the subscriber called an internet protocol ("IP")
12 address. Id. ¶ 6. Using the services of Media Protector,
13 Plaintiff has identified sixty-five IP addresses from which
14 infringing copies of its works were reproduced and distributed.
15 Id. ¶¶ 7-11; Compl. ¶¶ 22-86. Plaintiff has also recorded the
16 exact time and date of these events. Compl. ¶¶ 22-86. Cox
17 Communications is the ISP that controls all of the IP addresses
18 identified in Plaintiff's Complaint. Eichner Decl. ¶ 13.
19 Plaintiff seeks leave to serve a Rule 45 third-party subpoena on
20 Cox Communications to determine the identity of the subscribers
21 associated with these IP addresses. Request for Leave to Take
22 Discovery at 2.

23 **A. Good Cause**

24 The Court finds that Plaintiff has shown good cause for
25 limited expedited discovery. Expedited discovery is appropriate
26

27 ¹ Michael Eichner ("Eichner"), co-owner and chief developer of
28 Media Protector, filed a declaration in support of the Request for
Leave to Take Discovery. ECF No. 5.

1 because ISPs typically retain subscriber logs for only a short
2 period of time before destroying the information. Eichner Decl.
3 ¶ 10. A third-party subpoena appears to be the only way Plaintiff
4 can identify the Doe Defendants, and Plaintiff must identify them
5 in order to effect service of process.

6 **B. The Seescandy.com Factors**

7 The Court finds that Plaintiff has satisfied the four-factor
8 test outlined in seescandy.com for leave to conduct discovery to
9 identify Doe defendants. Plaintiff has identified the Defendants
10 with specificity, and recounted the steps taken to locate
11 Defendants, by identifying IP addresses, as well as exact dates and
12 times of alleged infringing activity. See Eichner Decl.; Compl. ¶¶
13 22-86.

14 In order to succeed in a copyright infringement claim, "a
15 plaintiff must show that he or she owns the copyright and that
16 defendant copied protected elements of the work." Cavalier v.
17 Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (citing Shaw
18 v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990)). Here, Plaintiff
19 has submitted copies of registration certificates issued by the
20 U.S. Copyright Office for the works identified in the Complaint.
21 See Ruoff Decl. Ex. A.² Taken together with the allegations of
22 unauthorized reproduction and distribution in the Complaint,
23 Plaintiff has demonstrated that its claim of copyright infringement
24 is likely to survive a motion to dismiss.

25 Plaintiff seeks leave to serve a subpoena on Cox
26 Communications to determine the names and addresses of the

27 ² Keith Ruoff ("Ruoff"), Vice President of Io Group, Inc., filed a
28 declaration in support of the Request for Leave to Take Discovery.
ECF No. 6.

1 subscribers to whom Cox Communications assigned the IP addresses
2 identified in the Complaint. Request for Leave to Take Discovery
3 at 6-7. As such, Plaintiff has identified the entity that should
4 be served. Having satisfied the seescandy.com factors, the Court
5 finds that Plaintiff should be permitted to serve a subpoena on Cox
6 Communications. The subpoena should be substantially identical in
7 form to the subpoena attached as Exhibit A to Plaintiff's Request,
8 although the subpoena should be limited to a request to produce
9 documents sufficient to identify the names, addresses, telephone
10 numbers, and e-mail addresses associated with the sixty-five IP
11 addresses.³

12 **C. Opportunity to Move to Quash or Modify**

13 Federal Rule of Civil Procedure 45 provides that a subpoena
14 may be quashed or modified if it requires disclosure of privileged
15 or "other protected matter," or if it subjects a person to undue
16 burden. Fed. R. Civ. P. 45(c)(3)(A)(iii) and (iv). As such, Cox
17 Communications shall be required to provide notice of the subpoena
18 to the subscribers so that they have the opportunity to move to
19 quash or modify. While the Court is granting Plaintiff's request
20 to serve the subpoena on Cox Communications, the Court is not
21 predetermining the merits of any motion to quash or modify that
22 might be filed by Doe Defendants after they receive notice.

23
24 **V. CONCLUSION**

25 For good cause shown, Plaintiff's Request for Leave to Take

26 ³ The attached proposed subpoena also seeks documents sufficient to
27 identify "Media Access Control" addresses, but Plaintiff has not
28 explained their role to the Court or why they are necessary. As
such, they should not be requested in the subpoena sent to Cox
Communications.

1 Early Limited Discovery is GRANTED. Plaintiff may serve a Rule 45
2 subpoena on Cox Communications seeking documents sufficient to
3 identify the names, addresses, telephone numbers, and e-mail
4 addresses associated with the sixty-five IP addresses identified in
5 the Complaint. Cox Communications, in turn, shall serve a copy of
6 the subpoena and a copy of this Order upon its relevant subscribers
7 within ten (10) days of its receipt of the subpoena. The
8 subscribers shall then have fifteen (15) days from the date of
9 service upon them to file any motions to quash or modify. If that
10 15-day period elapses without a subscriber filing a motion to quash
11 or modify, Cox Communications shall have ten (10) days to produce
12 that subscriber's name, address, phone number, and e-mail address
13 to Plaintiff pursuant to the subpoena.

14
15 IT IS SO ORDERED.

16
17 Dated: October 15, 2010

18 
UNITED STATES DISTRICT JUDGE