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United States District Court
Northern District of California

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

BERLIN MEDIA ART e.k.,
Plaintiff,
v.
DOES 1 – 44,
Defendants.

Case No.: 11-03770 (JSC)
**ORDER RE: PLAINTIFF’S
RENEWED REQUEST FOR
DISCOVERY PRIOR TO RULE 26(f)
CONFERENCE (Dkt. No. 22)**

This case is one of several “mass copyright” cases filed in this District on behalf of various plaintiffs against thousands of doe defendants accused of using BitTorrent technology to illegally download copyrighted files from the internet. Now pending before the Court is Plaintiff’s third motion for limited ex parte discovery under Federal Rules of Civil Procedure 26(d) and 45 prior to the Rule 26(f) conference. Specifically, Plaintiff seeks to subpoena internet service providers (“ISPs”) for personal information that will reveal the identities of the 44 Doe Defendants named in this suit. (Dkt. Nos. 20, 22). For the reasons explained below, the Court DENIES the motion.

BACKGROUND

Plaintiff alleges that the 44 Doe Defendants (“Defendants”) used BitTorrent, an internet peer-to-peer (“P2P”) file sharing network, to illegally reproduce and distribute

1 Plaintiff’s copyrighted work—“Sperma triologie”—in violation of the Copyright Act, 17
2 U.S.C. § 501 et seq. (Second Amended Complaint, pp. 1-3 , Dkt. No. 20.) BitTorrent “allows
3 a user to join a ‘swarm’ comprised of multiple users hosting the sought after file on their
4 personal computer to download and upload from each other simultaneously.” (Dkt. No. 22, p.
5 2). Plaintiff maintains that “the Defendants were all part of the same swarm,” although
6 Plaintiff has not provided information regarding when the swarm occurred. (Dkt. No. 22, p.
7 8). Plaintiff contends that because Defendants’ conduct occurred behind the mask of their
8 anonymous internet protocol (“IP”) addresses, Plaintiff cannot identify Defendants without
9 leave to subpoena Defendants’ internet service providers (“ISPs”) for the identity of the
10 individual or entity related to each IP address. “[B]ecause each ISP assigns a unique IP
11 address to each subscriber and retains subscriber activity records regarding the IP addresses
12 assigned, the information sought in the subpoena will enable Plaintiff to serve Defendants and
13 proceed with this case.” (Dkt. No. 11, p. 2). Consequently, Plaintiff asks the Court to grant
14 expedited discovery to issue subpoenas to the relevant ISPs requiring disclosure of the name,
15 address, telephone number, and email address for each Defendant’s IP address. (Dkt. No. 3, p.
16 3).

17 This is the third time Plaintiff has sought an order from the Court authorizing
18 expedited discovery prior to the Rule 26(f) conference. On October 18, 2011, the Court
19 denied the motion because Plaintiff had not established personal jurisdiction over the then
20 654 Doe Defendants or that venue was proper in this District. (Dkt. No. 12). In addition, the
21 Court expressed concerns regarding joinder under Federal Rule of Civil Procedure 20(a).
22 The motion was denied without prejudice to Plaintiff amending its complaint. Plaintiff
23 renewed the motion without amending the complaint to establish venue or personal
24 jurisdiction, and on November 17, 2011, the Court denied the second motion for the same
25 reasons as the first. (Dkt. No. 15). On December 16, 2011, Plaintiff amended the complaint
26 to name 44 Doe Defendants, and on January 10, 2012, filed the underlying third motion for
27 expedited discovery. (Dkt. Nos. 20 and 22).

28

1 service providers assign static IP addresses that remain constant with regard to that particular
2 user, but many assign dynamic IP addresses that change each time the user connects to the
3 Internet”).¹

4 **B. Previous Steps Taken to Identify the Doe Defendants**

5 Given Plaintiff’s failure to specify the date and time of the allegedly infringing
6 activity, the Court questions whether Plaintiff has taken any meaningful steps to identify the
7 Doe Defendants since this information is crucial to determining which subscriber was
8 associated with a particular IP address.

9 **C. Withstanding a Motion to Dismiss**

10 To prevail on its copyright claim, Plaintiff must prove (1) that it owns a valid
11 copyright, and (2) that each defendant copied a work covered by the copyright. Online Policy
12 Group v. Diebold, Inc., 337 F.Supp.2d 1195, 1199 (N.D. Cal. Sep. 30, 2004). “To be liable
13 for direct infringement, one must actively engage in and directly cause the copying.” Id.
14 (internal quotation marks and citation omitted). Although Plaintiff has submitted evidence
15 that it is the owner of the copyright to “Sperma trilogy,” Plaintiff’s failure to allege when each
16 Defendant intentionally copied its work precludes Plaintiff from establishing a prima facie
17 case of infringement. Accordingly, Plaintiff cannot demonstrate that the Complaint could
18 withstand a motion to dismiss. See Columbia Ins. Co., 185 F.R.D. at 579.

19 Furthermore, as the Court noted in its October 18, 2011 Order, the Court has concerns
20 regarding the propriety of joinder in this case. (Dkt. No. 12, p. 6). Under Federal Rule of
21 Civil Procedure 20(a), proper joinder requires both that claims against all defendants stem
22 from the same transaction or occurrence or series of transactions or occurrences and also that
23 all defendants share in common any question of law or fact. When defendants are not
24 properly joined, Federal Rule of Civil Procedure 21 permits the court “at any time, on just
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26 ¹ For example, Comcast, the ISP for fourteen of the Doe Defendants, states on its website that
27 “You should expect to get a new IP address each time you log in to XFINITY Internet 2go. IP
28 addresses are assigned from a pool of dynamic public IP addresses; the assignment will be for
one session only.” See <http://customer.comcast.com/help-and-support/wireless-internet/ip-addresses-with-internet-2go/>.

1 terms, to add or drop a party” if “no substantial right will be prejudiced by the severance.”
2 Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997).

3 Several courts have held that “the mere allegation that defendants have used the same
4 peer-to-peer network to infringe a copyrighted work is insufficient to meet the standards for
5 joinder set forth in Rule 20.” Diabolic Video Productions, Inc. v. Does 1-2099, No. 10-5865,
6 2011 WL 3100404, at *3 (N.D. Cal. May 31, 2011) (listing cases). This is particularly true
7 where Plaintiff’s allegations span significant periods of time. See, e.g., Third Degree Films v.
8 Does 1-3577, No. 11-2768, 2011 WL 5374569, at *3 (N.D. Cal. Nov. 4, 2011) (finding
9 joinder improper where the 3,577 Doe defendants downloaded the protected work at various
10 dates and times ranging from November 11, 2010 to June 1, 2011); On The Cheap, LLC v.
11 Does 1-5011, No. 10-4472, 2011 WL 4018258 (N.D. Cal. Sept. 6, 2011) (finding that the
12 seven-week gap of time between the alleged infringing acts of the first user and last user
13 failed to support an inference that the users were cooperating with each other). Indeed, the
14 Court cannot see how joinder is proper where, as here, “Plaintiff [did] not plead facts showing
15 that any particular defendant illegally shared plaintiff’s work with any other particular
16 defendant.” Boy Racer, Inc. v. Does 1–60, No. 11–01738, 2011 WL 3652521, at *4 (N.D.
17 Cal. Aug. 19, 2011).

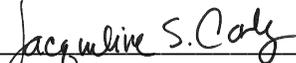
18 Based on Plaintiff’s failure to specify the date and time of the alleged infringement by
19 each Doe Defendant, the Court in its discretion denies the motion for expedited discovery.

20 **CONCLUSION**

21 Accordingly, the renewed motion for expedited discovery (Dkt. No. 22) is DENIED
22 without prejudice to renewal accompanied by information regarding when the allegedly
23 infringing activity occurred for each Doe Defendant.

24 **IT IS SO ORDERED.**

25 Dated: January 24, 2012

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27 
28 JACQUELINE SCOTT CORLEY
UNITED STATES MAGISTRATE JUDGE