

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
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
Oakland Division

PATRICK COLLINS INC, No. C 10-05886 LB
Plaintiff, **ORDER DENYING APPLICATION**
v. **TO EXTEND TIME AND**
DOES 1-3757, **DISMISSING CASE**
Defendants. [ECF No. 14]

I. INTRODUCTION

Plaintiff Patrick Collins, Inc. filed its complaint on December 27, 2010. ECF No. 1 at 1.¹ On April 13, 2011, Plaintiff filed an *ex parte* application for leave to take limited discovery prior to a Rule 26 conference. ECF No. 8 at 1. But the proposed order gave the Internet Service Providers and subscribers each 30 days in which to object to the subpoenas. ECF No. 8-3 at 2. Based on this time line, even if the court had ruled on the motion immediately and Plaintiff served the subpoenas that same day, Plaintiff would not have been expected to file proof of service until June 12, 2011. And – by Plaintiff’s own admission – this scenario was unlikely given that, in its request for an order vacating the case management conference, Plaintiff stated that some Internet Service Providers cannot quickly produce the requested information. ECF No. 9 at 2. Federal Rule of Civil Procedure 4(m) requires the plaintiff to serve the defendants within 120 days of filing the complaint or by April

¹ Citations are to the clerk’s electronic case file (ECF) with pin cites to the electronic page numbers at the top (as opposed to the bottom) of the page.

1 26, 2011. Fed. R. Civ. P. 4(m). Therefore, on May 10, 2011, the court issued an order to show
2 cause why the action should not be dismissed for failure to serve the defendants. ECF No. 11 at 2.
3 Plaintiff filed a response to the order to show cause, focusing on the delays in getting names from
4 the Internet Service Providers. ECF No. 12 at 3. The court now denies Plaintiff's application to
5 extend time to serve and dismisses the case because Plaintiff did not show good cause for its failure
6 to name and serve any defendants within the time period set forth by Rule 4(m).

7 II. LEGAL STANDARDS

8 A. Time to Serve Doe Defendants

9 Federal Rule of Civil Procedure 4(m) requires a plaintiff to serve a defendant within 120 days
10 after it files the complaint. The 120 days for service runs from the date of the original complaint for
11 all Doe Defendants – identified by Doe number, the Internet Protocol address associated with each
12 Defendant, the identity of the Internet Service Provider associated with the Internet Protocol
13 address, the last-observed date and time that the infringement by that Defendant was observed, and
14 the software protocol used by the Defendant – named in the original complaint. *See Harris v. City of*
15 *Cleveland*, 7 Fed. Appx. 452, 456 (6th Cir. 2001) (“A plaintiff cannot extend the service period with
16 respect to an already-named defendant by filing an amended complaint naming additional
17 defendants.”) (citing 4A Wright & Miller, Federal Practice & Procedure § 1137, at 103 (Supp.
18 2000)); *Carmona v. Ross*, 376 F.3d 829, 830 (8th Cir. 2004) (holding that district court did not abuse
19 its discretion in dismissing defendants named in an amended complaint when they had been named
20 in an earlier complaint but not served within 120 days of the filing of the original complaint); *Scott*
21 *v. Hern*, 216 F.3d 897, 911-912 (10th Cir. 2000) (upholding dismissal of an action against Doe
22 defendants for failure to effect timely service under Rule 4(m)); *Figueroa v. Rivera*, 147 F.3d 77, 83
23 (1st Cir. 1998) (holding, in the alternative, that dismissal was proper pursuant to Rule 4(m) where
24 the plaintiff failed to identify and serve an unknown defendant within 17 months of filing the
25 complaint); *Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (N.D. Ill. 1995) (holding that
26 Doe defendants must be identified and served within 120 days of the commencement of the action
27 against them (but declining to dismiss the action)); *Sedaghatpour v. California*, No. C 07-01802
28 WHA, 2007 WL 2947422, at *2 (N.D. Cal. Oct. 9, 2007) (“Furthermore, the Court may dismiss

1 'Doe' defendants who are not identified and served within 120 days after the case is filed pursuant to
2 FRCP 4(m)."); *cf. McGuckin v. United States*, 918 F.2d 811, 812, 813 (9th Cir. 1990) (holding that
3 time to serve defendants *added in the new complaint* runs from filing of new complaint). This
4 approach comports with the policies underlying the rule. *See Fimbres v. United States*, 833 F.2d
5 138, 139 (9th Cir. 1987) ("Rule 4(j) [Rule 4(m)'s predecessor] is intended to force parties and their
6 attorneys to be diligent in prosecuting their cause of action.") (citing *Wei v. State of Hawaii*, 763
7 F.2d 370, 372 (9th Cir. 1985)).

8 **B. Good Cause**

9 A court may dismiss a case without prejudice if a plaintiff has not complied with Rule 4(m)
10 unless the plaintiff shows good cause for its failure to serve a defendant. Fed. R. Civ. P. 4(m). If
11 good cause appears, the court must extend the time for service for an appropriate period. *Id.*
12 Whether good cause exists is determined on a case by case basis. *In re Sheehan*, 253 F.3d 507, 512
13 (9th Cir. 2001). A plaintiff may show good cause where it attempted to serve a defendant but has
14 not yet completed it, was confused about the requirements for service of process, or was prevented
15 from serving a defendant because of events outside of its control. *See Wei v.*, 763 F.2d at 372
16 (applying the good cause standard in Rule 4(j) which was replaced by Rule 4(m) in 1993); *Mateo v.*
17 *M/S KISO*, 805 F. Supp. 792, 795 (N.D. Cal. 1992) (overturned on other grounds). Evasion of
18 service could also constitute good cause for delay in service. *Id.* at 371; *Intrade Industries, Inc. v.*
19 *Foreign Cargo Mgmt. Corp.*, No. 1:07-CV-1893 AWI GSA, 2008 WL 5397495, at *1 (E.D. Cal.
20 Dec. 24, 2008) (citing *Hendry v. Schneider*, 116 F.3d 446, 449 (10th Cir. 1997)).

21 **III. DISCUSSION**

22 **A. Whether Plaintiff Demonstrated Good Cause for its Failure to Seek Early Discovery to** 23 **Serve Defendants Within the Time Period Set Forth in Rule 4(m)**

24 Plaintiff filed a response to the order to show cause, focusing on the delays in getting names
25 from the Internet Service Providers. ECF No. 12 at 3. Plaintiff did not explain why it waited to seek
26 early discovery until just ten days before the Rule 4(m) deadline. Instead, Plaintiff discusses the
27 difficulties in determining the identities of the defendants in the context of a number of other
28 pending cases. *Id.* at 4-6. And Plaintiff represents that it is working with the Internet Service

1 Providers to streamline the process for identifying individuals and attributes some of the delays to
2 the Internet Service Providers' difficulties in providing the necessary information. *Id.* at 5-6.

3 Plaintiff also argues that dismissal is not required or warranted at this stage, pointing out that the
4 cases in the court's order to show cause involved longer delays or did not result in a dismissal for
5 reasons of judicial economy. *Id.* at 6-7. Plaintiff further claims that defendants would not be
6 prejudiced. *Id.* at 8.

7 But, in this case, the court has no confidence that Plaintiff has shown the requisite diligence in
8 moving to identify, name, and serve defendants, despite its (unsworn) claims to the contrary. For
9 example, Plaintiff's counsel states that he has filed ten other copyright cases involving a large
10 number of Doe defendants. ECF No. 12 at 4. The court previously reviewed these dockets and
11 noted that the plaintiffs in these cases had not filed proof of service for even a single defendant even
12 though a number of defendants have been identified and dismissed after settling with the plaintiffs.
13 *See, e.g., Media Products, Inc. DBA Devil's Film v. Does 1-1257*, Case No. CV 10-04471 RS
14 (complaint filed on October 4, 2010 and no proof of service filed for any defendant as of July 29,
15 2011, but four Doe defendants have been dismissed after settling). The plaintiffs in these cases
16 appear content to force settlements without incurring any of the burdens involved in proving their
17 cases. And, while the courts favor settlements, "filing one mass action in order to identify hundreds
18 of doe defendants through pre-service discovery and facilitate mass settlement, is not what the
19 joinder rules were established for." *IO Group, Inc. v. Does 1-435*, No. C 10-4382 SI, 2011 WL
20 445043, at *6 (N.D. Cal. Feb. 3, 2011).

21 Additionally, the court does not find that Plaintiff will be unduly prejudiced by a dismissal
22 without prejudice. The earliest date of an illegal download identified in Plaintiff's Exhibit A is May
23 13, 2010. ECF No. 1 at 104. Under 17 U.S.C. § 507, a civil copyright action must be commenced
24 within three years after the claim accrued. Furthermore, Plaintiff claims to have coordinated with
25 the Internet Service Providers to streamline the systems for acquiring identifying information and, as
26 evidenced by the stipulated dismissals, appears to be receiving such information already.

27 The case law in similar cases does not compel a different result. For example, a court in the
28 Northern District of Illinois dismissed a similar complaint after only 131 days, noting the potential

1 for abuse. *CP Productions, Inc. v. Does 1-300*, Civ. No. 10 C 6255, Memorandum Order, ECF No.
2 27 (N.D. Ill. Feb. 7, 2011). Shortly thereafter, the court denied the plaintiff's motion for
3 reconsideration. *CP Productions, Inc. v. Does 1-300*, No. 10 C 6255, 2011 WL 737761, at *1 (N.D.
4 Ill Feb. 24, 2011). In its order denying the plaintiff's motion for reconsideration, the court expanded
5 upon its concerns. Specifically, the court noted the serious issues regarding personal jurisdiction,
6 joinder, and venue. *Id.* The court then ordered the subpoena issued to the Internet Service Provider
7 to be quashed. *Id.* The court also ordered the plaintiff to direct the Internet Service Provider to
8 notify (at the plaintiff's expense) all those to whom the Internet Service Provider had previously
9 given notice of the plaintiff's subpoena issued to the Internet Service Provider. *Id.* The notice was
10 to include (1) the fact of this dismissal and (2) the fact that the Internet Service Provider will take no
11 further action in connection with the now-quashed subpoena, so that those persons are free to ignore
12 the matter. *Id.* In the instant case, the undersigned identifies the same concerns as discussed in the
13 *CP Productions* orders.

14 In *IO Group, Inc. v. Does 1-19*, No. C 10-03851 SI, 2011 WL 772909 (N.D. Cal. Mar. 1, 2011),
15 the district court rejected a subscriber's motion for dismissal pursuant to Rule 4(m). In *IO Group*,
16 the plaintiff argued that the subscriber asserted that he did not infringe plaintiff's work, suggesting
17 that someone else used his IP address to infringe the plaintiff's work. *Id.* at *1. The plaintiff then
18 claimed that it needed to take third-party discovery from the subscriber to try to identify who
19 actually used the subscriber's IP address to allegedly infringe the plaintiff's work. *Id.* The court
20 granted the plaintiff 60 days to identify and serve the Doe defendant. *Id.* at *2. The plaintiff never
21 served the defendant, and the court dismissed the case. Docket No. C 10-03851 SI, Order, ECF No.
22 41 at 1. Here, Plaintiff merely claims that the Internet Service Providers will be slow in providing
23 the necessary information. But Plaintiff has neither explained why it delayed in seeking the
24 discovery nor identified new third-party discovery that is necessary. Additionally, the ultimate
25 disposition of the *IO Group* case highlights the court's concern that the plaintiffs in these kinds of
26 cases are not genuinely prepared to bring their cases.

27 **B. Whether this Court Can Dismiss the Complaint**

28 Plaintiff has consented to this court's jurisdiction. ECF No. 6. The court does not require the

1 consent of the defendants to dismiss an action when the defendants have not been served and
2 therefore are not parties under 28 U.S.C. § 636(c). *Ornelas v. De Frantz*, C 00-1067 JCS, 2000 WL
3 973684, at *2 n.2 (N.D. Cal. June 29, 2000) (citing *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir.
4 1995)); *cf. United States v. Real Property*, 135 F. 3d 1312, 1316 (9th Cir. 1997) (holding that the
5 consent of an individual who was not a party was not a precondition to the magistrate judge's
6 jurisdiction).

7 **IV. CONCLUSION**

8 For the foregoing reasons, the court **DENIES** Plaintiff's application to extend time and
9 **DISMISSES** Plaintiff's complaint without prejudice.

10 **IT IS SO ORDERED.**

11 Dated: November 4, 2011

12 
13 _____
14 LAUREL BEELER
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25
26
27
28