

UNITED STATES DISTRICT COURT

Northern District of California

AXEL BRAUN,

Plaintiff,

v.

PRIMARY DISTRIBUTOR DOE NUMBER
1 and DEFENDANT DOES 2 through 38,

Defendants.

No. C 12-5786 MEJ

and related cases: 12-5812 MEJ

12-5813 MEJ

12-5814 MEJ

**ORDER GRANTING EX PARTE
APPLICATIONS FOR LEAVE TO
TAKE EARLY DISCOVERY**

Plaintiff Axel Braun (“Plaintiff”) brings these four related cases accusing Doe Defendants¹ of using BitTorrent technology to illegally download copyrighted files from the Internet. Plaintiff has filed Ex Parte Applications in each of the cases pursuant to Federal Rule of Civil Procedure (“Rule”) 26, requesting leave to take expedited discovery to determine the identity of Defendants (“Defendants”) named in these action.² For the reasons explained below, the Court **GRANTS** Plaintiff’s Application.

BACKGROUND

Braun is an individual doing business as Axel Braun Productions, with his principal place of business located in Porter Ranch, California. Compl. ¶ 9, Dkt. No. 1. Axel Braun Productions directs, markets, and distributes adult entertainment products, including Internet website content, videos, DVDs, and photographs. *Id.* ¶ 10. Plaintiff is the co-producer and co-claimant of the

¹ Plaintiff is suing 38 Doe Defendants in 12-5786, 40 in 12-5812, 151 in 12-5813, and 129 in 12-5814. The Court shall refer to these Doe Defendants collectively as “Defendants.”

² The applications are: Dkt. No. 6 in 12-5786; Dkt. No. 5 in 12-5812; Dkt. No. 5 in 12-5813; Dkt. No. 6 in 12-5814. Because the related cases have virtually identical facts, citations herein reference documents filed in 12-5786, unless otherwise noted.

1 copyrights in the motion picture, *Star Wars XXX: A Porn Parody*.³ *Id.* ¶ 32. Plaintiff registered the
 2 copyright for *Star Wars XXX: A Porn Parody* with the United States Copyright Office, and the
 3 Copyright Office assigned the work the registration number PA 1-787-699. *Id.*

4 Plaintiff alleges that Defendants used BitTorrent, an internet peer-to-peer (“P2P”) file
 5 sharing network, to illegally reproduce and distribute *Star Wars XXX: A Porn Parody* in violation of
 6 the Copyright Act, 17 U.S.C. § 101 et seq. *Id.* ¶¶ 17-28, 33-35. Plaintiff further alleges that by
 7 using the BitTorrent program to download and distribute Plaintiff’s content, each Defendant is liable
 8 for contributory infringement. *Id.* ¶¶ 37-45. Because the alleged infringement occurred on the
 9 Internet, Plaintiff states that Defendants acted under the guise of their Internet Protocol (“IP”)
 10 addresses rather than their real names. Strassmeir Decl. ¶ 18, Dkt. No. 6-1. As a result, Plaintiff
 11 contends that it cannot determine Defendants’ true identities without procuring the information from
 12 Defendants’ respective Internet Service Providers (“ISPs”), which can link the IP addresses to a real
 13 individual or entity. *Id.* ¶ 24. Consequently, Plaintiff asks the Court to grant expedited discovery to
 14 issue subpoenas to the relevant ISPs so that the ISPs will produce identifying information for each
 15 Defendant.

16 DISCUSSION

17 Rule 26(d)(1) prohibits discovery without a court order prior to a Rule 26(f) conference
 18 between the parties. Courts generally use a “good cause” standard to decide whether to permit such
 19 early discovery. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).
 20 “Good cause may be found where the need for expedited discovery, in consideration of the
 21 administration of justice, outweighs the prejudice of the responding party.” *Id.* at 276. To
 22 determine whether there is “good cause” to permit expedited discovery to identify anonymous
 23 internet user doe defendants, courts consider whether:

24
 25 ³ Plaintiff states that he and Vivid Entertainment, LLC jointly produced and created *Star*
 26 *Wars XXX: A Porn Parody*, but the originally filed registration application mistakenly omitted Axel
 27 Braun Productions. Compl. at 8, fn. 1. The claimants have submitted a supplemental registration
 28 naming Axel Braun Productions as a co-claimant and the Copyright Office is currently processing
 the supplement registration. *Id.*

(1) the plaintiff can identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible.

OpenMind Solutions, Inc. v. Does 1–39, No. 11–3311, 2011 WL 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (citing *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999)). The Court will consider each of these factors in turn.

A. Identification of Defendants as Persons Who Can Be Sued

Under the first factor, the Court must examine whether Plaintiff has identified the Defendants with sufficient specificity, demonstrating that each Defendant is a real person or entity who would be subject to jurisdiction in this Court. *Columbia Ins. Co.*, 185 F.R.D. at 578. Plaintiff proffers that he retained Media Protector International GmbH (“MPI”), which utilized forensic software to identify Defendants’ IP addresses on the date and time that they engaged in the alleged distribution of *Star Wars XXX: A Porn Parody* via the BitTorrent protocol, and has compiled the information into a log attached as Exhibit A to Plaintiff’s Complaint. Strassmeir Decl. ¶¶ 2, 11–18, Ex. A. Plaintiff explains that each time the subscriber accesses the Internet, the ISP provides a unique IP address that is somewhat akin to a telephone number, and that ISPs record in user logs the times and dates it assigns each IP address to a subscriber. *Id.* ¶ 20. The IP addresses MPI identified enable it to determine which ISP each peer used to gain access to the Internet. *Id.* ¶ 22. MPI can then search public databases to determine which Internet access provider controls a specific IP address. *Id.* Plaintiff can then use this information to obtain Defendants’ names, addresses, e-mail addresses, and other identifying information. *Id.* ¶ 18. Thus, the Court finds that Plaintiff has come forward with sufficient information demonstrating that the Defendants are real persons or entities who may be sued in federal court. See *MCGIP, LLC v. Does 1–149*, 2011 WL 3607666, at *2 (N.D. Cal. Aug. 15, 2011) (finding that the plaintiff had identified the doe defendants with sufficient specificity by submitting a chart listing each of the defendants by the IP address assigned to them on the day it alleged the particular defendant engaged in the infringing conduct).

B. Previous Steps Taken to Identify the Doe Defendants

Under the second factor, the Court must assess the prior steps Plaintiff has taken to locate the Defendants. *Columbia Ins. Co.*, 185 F.R.D. at 579. “This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants.” *Id.* Having reviewed Mr. Strassmeir’s testimony, the Court is satisfied that Plaintiff has sufficiently described its efforts to identify Defendants. Mr. Strassmeir states that once MPI identified a peer distributing *Star Wars XXX: A Porn Parody*, it obtained and recorded publically available information about the peer, including the time and date at which the peer distributed the file, the IP address the peer used to access the Internet, and the infohash (a unique identifier created for each file by the BitTorrent protocol). Strassmeir Decl. ¶ 15. Mr. Strassmeir states that, because of the partially anonymous nature of the P2P Internet distribution system used by Defendants, MPI is unable to determine their true names, street addresses, telephone numbers, and email addresses. *Id.* ¶ 18.

C. Withstanding a Motion to Dismiss

Under the third factor, the inquiry shifts to the substance of Plaintiff’s claims and analyzes whether Plaintiff’s Complaint would likely survive a motion to dismiss. *Columbia Ins. Co.*, 185 F.R.D. at 579. In its Complaint, Plaintiff has asserted a federal copyright infringement claim. To state a claim for copyright infringement, Plaintiff must establish: (1) ownership of a valid copyright, and (2) copying of constituent elements of the copyrighted work that are original. *Rice v. Fox Broad. Corp.*, 330 F.3d 1170, 1174 (9th Cir. 2003) (citing *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). “To be liable for direct infringement, one must ‘actively engage in’ and ‘directly cause’ the copying.” *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1199 (N.D. Cal. 2004).

Reviewing Plaintiff’s Complaint, Plaintiff has adequately alleged that *Star Wars XXX: A Porn Parody* is the subject of a valid Certificate of Registration issued by the United States Copyright Office and that Plaintiff is the co-claimant in the copyrights for the movie. Compl. ¶ 2. Plaintiff has also alleged that the Defendants reproduced and distributed *Star Wars XXX: A Porn*

1 *Parody* via BitTorrent to numerous third parties. Compl. ¶¶ 33-34. Additionally, Plaintiff has
2 alleged that Defendants actively engaged in or directly caused the copying by completing each of the
3 steps in the BitTorrent file-sharing protocol, including intentionally downloading a torrent file
4 particular to *Star Wars XXX: A Porn Parody*, loading that torrent file into the BitTorrent client,
5 entering a BitTorrent swarm particular to *Star Wars XXX: A Porn Parody*, and ultimately,
6 downloading and uploading pieces of a *Star Wars XXX: A Porn Parody* file to eventually obtain a
7 whole copy of the file. *Id.* ¶¶ 18-29. Based on these allegations, the Court finds that Plaintiff has
8 pled a prima facie case of copyright infringement.

9 Plaintiff has also made a prima facie showing that the Complaint would withstand a motion
10 to dismiss for lack of personal jurisdiction. The Complaint alleges that the ISP associated with each
11 Doe Defendant is located in California; thus, the allegations of the Complaint support an inference
12 that all of the Doe Defendants reside in California. *Id.* ¶ 6. At this stage in the proceedings, this is
13 a sufficient showing. Accordingly, Plaintiff has set forth sufficient supporting facts to survive a
14 motion to dismiss.

15 **D. Whether there is a Reasonable Likelihood of Being Able to Identify Defendants**

16 The fourth factor examines whether Plaintiff has demonstrated that there is a reasonable
17 likelihood that the discovery he requests will lead to the identification of Defendants such that it
18 may effect service of process. *Columbia Ins.*, 185 F.R.D. at 580. As indicated above, Plaintiff
19 contends that the key to locating the Defendants is through the IP addresses associated with the
20 alleged activity on BitTorrent. Specifically, Plaintiff contends that because ISPs assign a unique IP
21 address to each subscriber and retain subscriber activity records regarding the IP addresses assigned,
22 the information sought in the subpoena will enable Plaintiff to serve Defendants and proceed with
23 this case. Pl.'s App. at 5; Strassmeir Decl. ¶¶ 19-23. Taking this into account, the Court finds that
24 Plaintiff has made a sufficient showing as to this factor.

25 **E. Summary**

26 Taking the above factors into consideration, the Court finds that Plaintiff has demonstrated
27 that good cause exists to grant leave to conduct early discovery. Moreover, the Court finds that the
28

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