

FILED

11 MAR -8 PM 2:41

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:



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
SOUTHERN DISTRICT OF CALIFORNIA

LIBERTY MEDIA HOLDINGS, LLC,

Plaintiff,

v.

DOES 1-59,

Defendants.

Case No. 10-1823-DMS (WVG)

ORDER GRANTING THIRD
MOTION ALLOWING PLAINTIFF
LEAVE TO TAKE
IMMEDIATE DISCOVERY

(DOC. # 37)

I

PROCEDURAL BACKGROUND

On September 1, 2010, Plaintiff Liberty Media Holdings, LLC (hereafter "Plaintiff") filed a Complaint against DOES 1-59 (hereafter "Defendants") for Unlawful Access to Stored Communications, in violation of 18 U.S.C. §§ 2701 and 2707 (The Electronic Stored Communications Privacy Act), violation of 18 U.S.C. § 1030 (The Computer Fraud & Abuse Act) and copyright infringement in violation of 17 U.S.C. § 501 (The Copyright Act). Plaintiff does not know the names of some of the Defendants. However, it has identified the unique Internet Protocol (hereafter "IP") addresses assigned to Defendants and the Internet Service Provider (hereafter "ISP") that provided

1 Defendants with internet access on the dates and times of the
2 allegedly illegal and infringing activity.

3 On March 7, 2011, Plaintiff filed a Third Motion for Order
4 Allowing Plaintiff Leave to Take Immediate Discovery (hereafter
5 "Motion"). The Motion seeks the Court's permission to conduct
6 immediate discovery regarding the identities of Defendants.
7 Specifically, Plaintiff seeks Time Warner (Road Runner) to produce all
8 documents and/or information sufficient to identify the users of the
9 IP address during the dates and times listed in Exh. 1 to Plaintiff's
10 Motion, and attached hereto as Exhibit 1.

11 The information requested in the subpoenas is governed by 47
12 U.S.C. § 551, which states in pertinent part:

13 (c) Disclosure of personally identifiable information
14 (2) A cable operator may disclose (personally identifiable
15 information concerning any subscriber) if disclosure is - -
16 (B)... made pursuant to a *court order* authorizing such
disclosure, if the subscriber is notified of such order by
the person to whom the order is directed. (emphasis added).

17 Accordingly, Plaintiff seeks a court order instructing the above-
18 noted ISP to produce to Plaintiff all documents and or information
19 sufficient to identify the users of the IP address during the dates
20 and times listed in Exh. 1.

21 Additionally, Plaintiff seeks to depose and issue written
22 discovery requests to John Carbon (aka John Carbone), identified as
23 Doe No. 7 in this action, and to Frances Bran, identified as Doe No.
24 22 in this action.

25 II

26 ANALYSIS

27 In accordance with Fed. R. Civ. P. 26(d), discovery does not
28 commence until the parties to an action meet and confer as prescribed

1 by Fed. R. Civ. P. 26(f), unless by court order or agreement of the
2 parties. A court order permitting early discovery may be appropriate
3 "where the need for the discovery, in consideration of the
4 administration of justice, outweighs the prejudice to the responding
5 party." Semitoool, Inc. v. Tokyo Electron America, Inc., 208 F.R.D.
6 273, 276 (N.D. Cal. 2002).

7 At least one district court in the Ninth Circuit has recognized
8 that "(s)ervice of process can pose a special dilemma for plaintiffs
9 in cases... in which the tortious activity occurred entirely on-line.
10 The dilemma arises because the defendant may have used a fictitious
11 name and address in the commission of the tortious acts." Columbia
12 Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999). In
13 Columbia, the court also stated that in light of the conflict between
14 the need to provide injured parties with a forum in which they may
15 seek redress for grievances, and the right to use the internet
16 anonymously or pseudonymously, a few principles should apply to
17 whether discovery to uncover the identity of a defendant is warranted.

18 The court stated:

19 First, the plaintiff should identify the missing party with
20 sufficient specificity such that the Court can determine
21 that (the) defendant is a real person or entity that could
22 be sued in federal court...

21 Second, the (plaintiff) should identify all previous steps
22 taken to locate the elusive defendant...

22 Third, Plaintiff should establish to the Court's
23 satisfaction that plaintiff's suit against (the) defendant
24 could withstand a motion to dismiss... Plaintiff must make
25 some showing that an act giving rise to civil liability
26 actually occurred and that the discovery is aimed at
27 revealing specific identifying features of the person or
28 entity who committed the act.

Id., at 578-580.

1 The Court agrees with these principles and finds as follows:

2 A. Identification of Defendants With Sufficient Specificity

3 Plaintiff has provided to the Court the unique IP address
4 assigned to each Defendant and the ISP and/or cable operator that
5 provided each Defendant with internet access. Further, the requested
6 discovery is necessary for Plaintiff to determine the name and address
7 of each Defendant who performed the allegedly illegal and infringing
8 acts. Therefore, Plaintiff has sufficiently identified each Defendant
9 such that the Court can determine if each Defendant is a person or
10 entity that could be sued in federal court.

11 B. Previous Steps Taken to Locate Defendants

12 The only information Plaintiff has regarding the Defendants is
13 his/her IP address and his/her ISP and/or cable operator. Therefore,
14 there are no other measures Plaintiff could take to identify the
15 Defendant other than to obtain his/her identifying information from
16 his/her ISPs and/or cable operator. Consequently, Plaintiff must serve
17 subpoenas on Defendants' ISPs and/or cable operators to obtain the
18 information it seeks.

19 C. Whether Plaintiff's Action Could Withstand
20 a Motion to Dismiss

21 1. Violation of 18 U.S.C. § 2701

22 Plaintiff has demonstrated that its claim for violation of 18
23 U.S.C. § 2701 could withstand a motion to dismiss. 18 U.S.C. § 2701
states in pertinent part:

24 ... (W)hoever (1) intentionally accesses without
25 authorization a facility through which electronic
26 communication service is provided;... (2) and thereby
obtains... access to a ... electronic communication while
it is in electronic storage... shall be punished...

27 18 U.S.C. § 2701 applies to trespasses in which the trespasser
28 gains access to information which he is not entitled to see.

1 Therapeutic Research Faculty v. NBTY, Inc., 488 F. Supp 2d 991 (E.D.
2 Cal. 2007).

3 18 U.S.C. § 2707 states in pertinent part:

4 ... Any provider of electronic communication service,
5 subscriber, or other person aggrieved by any violation of
6 this chapter in which the conduct constituting the
7 violation is engaged in with a knowing or intentional state
of mind may, in a civil action, recover from the person or
entity... which engaged in that violation such relief as
may be appropriate.

8 Here, Plaintiff's Complaint alleges that Defendant intentionally
9 accessed its web servers, which are facilities where electronic
10 communication services are provided, Defendant had no right to access
11 the copyrighted materials on Plaintiff's website, and Defendant
12 obtained access to these electronic communications while these
13 communications were in electronic storage. Therefore, it appears that
14 Plaintiff has alleged the *prima facie* elements of a violation of 18
15 U.S.C. § 2701. Accordingly 18 U.S.C. § 2707 authorizes Plaintiff's
16 action. As a result, the Court finds that Plaintiff's action in this
17 regard could withstand a motion to dismiss.

18 2. Violation of 18 U.S.C. § 1030

19 Plaintiff has demonstrated that its claim for violation of 18
20 U.S.C. § 1030 could withstand a motion to dismiss. 18 U.S.C. § 1030
21 states in pertinent part:

22 (a)(2)(C) Whoever... intentionally accesses a computer
23 without authorization... and thereby obtains - - ...
information from any protected computer if the conduct
24 involved an interstate or foreign communication...

25 (a)(7)(b) with intent to extort from any... person, any
26 money or thing of value transmits in interstate...
commerce... shall be punished as provided in subsection (c)
of this section...

27 (g) Any person who suffers damage or loss by reason of a
28 violation of this section may maintain a civil action
against the violator to obtain compensatory damages and
injunctive relief or any other equitable relief.

1 Here, Plaintiff's Complaint alleges that Defendant unlawfully and
2 without authorization entered into its computer server, which was used
3 in interstate commerce, where Plaintiff's copyrighted materials were
4 contained, stole Plaintiff's copyrighted materials, valued in excess
5 of \$15,000, and as a result of such conduct, caused Plaintiff to
6 suffer damage. Based on these facts, §1030(g) authorizes Plaintiff's
7 civil action. Therefore, it appears that Plaintiff has alleged the
8 *prima facie* elements of a violation of 18 U.S.C. § 1030. As a result,
9 the Court finds that Plaintiff's action in this regard could withstand
10 a motion to dismiss.

11 3. Copyright Infringement

12 Plaintiff has demonstrated that its claim for copyright
13 infringement could withstand a motion to dismiss. A plaintiff who
14 claims copyright infringement must allege (1) ownership of a valid
15 copyright, and (2) that the defendant violated the copyright owner's
16 exclusive rights under the Copyright Act, 17 U.S.C. §501(a).¹⁷ Ellison
17 v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004).

18 Here, Plaintiff has alleged that it is the owner of the
19 copyrights for certain motion pictures, which were accessed,
20 reproduced, distributed and publicly displayed by Defendants. Also,
21 Plaintiff alleges that Defendant, without authorization, intentionally
22 accessed, reproduced and distributed Plaintiff's copyrighted works
23 onto their local hard drives or other storage devices. Therefore, it
24 appears that Plaintiff has alleged the *prima facie* elements of
25 copyright infringement. As a result, the Court finds that Plaintiff's
26 action in this regard could withstand a motion to dismiss.

27

28 ¹⁷U.S.C. §501(a) states in pertinent part:
Anyone who violates any of the exclusive rights of the copyright owner...
is an infringer of the copyright of the author...

1 III

2 CONCLUSION

3 The Court, having reviewed Plaintiff's Third Motion for Leave To
4 Take Immediate Discovery, the authorities cited therein, as well as
5 other applicable statutes and law, finds that Plaintiff has satisfied
6 the principles discussed in 47 U.S.C. §551 and Columbia, supra.
7 Therefore, Plaintiff's Motion is GRANTED.

8 Accordingly, it is HEREBY ORDERED:

9 1. Within seven (7) calendar days after service of this Order,
10 Time Warner (Road Runner) shall notify the subscriber listed on Exh.
11 1 to this Order that his/her identity is sought by Plaintiff. The
12 subscriber whose identity is sought may, within 21 calendar days from
13 the date of such notice, file documents with the Court that contest
14 the subpoena.

15 2. Any information disclosed to Plaintiff in response to the
16 subpoena may be used by Plaintiff solely for the purposes of
17 protecting Plaintiff's rights in pursuing this litigation.

18 3. If Time Warner (Road Runner) wish to move to quash the
19 subpoena issued to them, they shall do so before the return date of
20 the subpoena. If such a motion is brought, Time Warner (Road Runner)
21 shall preserve the information sought by Plaintiff in the subpoena
22 pending resolution of such motion.

23 4. Plaintiff shall provide a copy of this Order to Time Warner
24 (Road Runner).

25 5. Plaintiff shall be permitted to depose and issue written
26 discovery requests to John Carbon (aka John Carbone) regarding Doe No.
27 7's use of the IP address 24.184.108.61 as this person is either Doe
28

1 No. 7 or is likely to have information pertaining to Doe No. 7's
2 identity.

3 6. Plaintiff shall be permitted to depose and issue written
4 discovery requests to Frances Bran regarding Doe No. 22's use of the
5 IP address 24.228.21.211 as this person is either Doe No. 22 or is
6 likely to have information pertaining to Doe No. 22's identity.

7
8 DATED: March 8, 2011

9
10
11 
12 _____
13 Hon. William V. Gallo
14 U.S. Magistrate Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Exhibit 1

| | | | | | |
|--|--|--|--|---------|---|
| | | | | | 7:39:19, 7:39:34, 7:39:42, 7:39:50, 7:39:57, 7:40:05, 7:40:11, 7:40:16, 7:40:22, 7:40:29, 7:40:35, 7:34:08, 7:34:13, 7:34:18, 7:34:30, 7:34:38, 7:34:44, 7:35:08, 7:37:22, 7:37:28 7:38:40, 7:38:47, 7:38:57, 7:39:03, 7:39:08, 7:39:14, 7:39:19, 7:39:34, 7:39:42, 7:39:50, 7:39:57, 7:40:05, 7:40:11, 7:40:16, 7:40:22, 7:40:29, 7:40:35, 7:34:04, 7:38:43, 7:38:53, 7:45:39, 7:45:49, 7:45:57, 7:46:04, 7:46:11, 7:46:16, 7:48:20, 7:48:25, 7:48:30, 7:48:36, 7:49:04, 7:49:05, 7:49:14, 7:49:55, 7:50:01, 7:50:07, 7:50:46, 7:34:04, 7:38:43, 7:38:53, 7:45:39, 7:45:49, 7:45:57, 7:46:04, 7:46:11, 7:46:16, 7:48:20, 7:48:25, 7:48:30, 7:48:36, 7:49:04, 7:49:05, 7:49:14, 7:49:55, 7:50:01, 7:50:07, 7:50:46, 7:45:33, 7:50:28, 7:50:34, 7:50:52, 7:31:18, 7:31:25, 7:31:31, 7:31:36, 7:31:43, 7:31:48, 7:32:52, 7:32:58, 7:33:13, 7:33:20, 7:33:48, 7:33:54, 7:45:26, 7:50:22, 7:50:38 |
| | | | | 4/15/10 | 9:46:11 |
| | | | | 4/16/10 | 3:44:29, 3:44:39, 3:45:20, 3:46:06, 3:46:57, 3:43:47, 3:43:53, 3:44:03, 3:44:09, 3:48:19 |