United States District Court
For the Northern District of California

1   **** E-filed June 21, 2011 ****

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PINK LOTUS ENTERTAINMENT, LLC,	No. **C-11-02263 HRL**
Plaintiff,	**ORDER GRANTING PLAINTIFF'S EX PARTE APPLICATION FOR LEAVE TO TAKE LIMITED EXPEDITED DISCOVERY**
v.	
DOES 1-46,	**[Re: Docket No. 6]**
Defendants.	

BACKGROUND

Plaintiff Pink Lotus Entertainment, LLC ("Pink Lotus"), a Delaware-based producer of adult film content, filed this complaint on May 12, 2011. Pink Lotus alleges that at least forty-six unknown Defendants knowingly and willfully infringed its copyright by downloading and sharing its copyrighted work ("Work"). Specifically, Pink Lotus alleges that Doe Defendants engaged in unlawful concerted conduct for the purpose of infringing its Work using an online peer-to-peer ("P2P") file-sharing tool called BitTorrent, in violation of the Copyright Act, 17 U.S.C. § 101 *et seq*. (See Compl. at 4-6). The BitTorrent protocol, as explained by Judge Grewal:

> is a decentralized method of distributing data. Since its release approximately 10 years ago, BitTorrent has allowed users to share files anonymously with other users. Instead of relying on a central server to distribute data directly to individual users, the BitTorrent protocol allows individual users to distribute data amo[ng] themselves by exchanging pieces of the file with each other to eventually obtain a whole copy of the file. When using the BitTorrent protocol, every user simultaneously receives information from and transfers information to one another.

1   In the BitTorrent vernacular, individual downloaders/distributors of a particular file
2   are called "peers." The group of peers involved in downloading/distributing a
    particular file is called a "swarm." A server which stores a list of peers in a swarm
3   is called a "tracker." A computer program that implements the BitTorrent protocol
    is called a BitTorrent "client."

4   The BitTorrent protocol operates as follows. First, a user locates a small "torrent"
    file. This file contains information about the files to be shared and about the tracker,
5   the computer that coordinates the file distribution. Second, the user loads the torrent
    file into a BitTorrent client, which automatically attempts to connect to the tracker
6   listed in the torrent file. Third, the tracker responds with a list of peers and the
    BitTorrent client connects to those peers to begin downloading data from and
7   distributing data to the other peers in the swarm. When the download is complete,
    the BitTorrent client continues distributing data to the peers in the swarm until the
8   user manually disconnects [from] the swarm or the BitTorrent client otherwise does
    the same.

9

10   Diabolic Video Productions, Inc. v. Does 1-2099, No. 10-CV-5865 (PSG), 2011 U.S. Dist.

11   LEXIS 58351, at *3-4 (N.D. Cal. May 31, 2011). As Pink Lotus notes, the BitTorrent protocol

12   "necessitates concerted action by many people in order to disseminate files" without which it is

13   "impossible" for users to download files. (Compl. at 3:5-8). As each new peer joins a swarm

14   and begins to download and share the designated file, the swarm grows larger and gains greater

15   efficiency. (See Hansmeier Decl. at ¶ 7). BitTorrent also allows users to exchange files without

16   having to disclose their identities, using only an Internet Protocol ("IP") address assigned to

17   them by their respective Internet Service Providers ("ISP"). (See Compl. at 4).

18   Pink Lotus hired Media Copyright Group ("MCG"), a firm specializing in online piracy

19   detection, to identify the IP addresses of individuals engaged in file-sharing of its copyrighted

20   Work. (See Hansmeier Decl. at ¶¶ 12-20). MCG used proprietary forensic software to locate the

21   swarms downloading and distributing Pink Lotus's Work and to identify the IP address of each

22   user in the swarm, noting the date and time of the observed activity. (See id., Compl. Ex. A).

23   Pink Lotus joined multiple Doe Defendants in this suit, claiming that P2P sharing of its

24   copyrighted Work comprised a transaction or series of transactions and asserting common

25   questions of law and fact among each Defendant. (See Compl. at 3-4). Using the list of IP

26   addresses, Pink Lotus seeks leave to subpoena the ISPs to identify each Doe Defendant's name,

27   address, telephone number, email address, and Media Access Control information. (Application

28   at 3:9-11). Pink Lotus claims that it cannot identify Doe Defendants for purposes of service of

1   process unless its Ex Parte Application for Leave to Take Limited Expedited Discovery

2   ("Application") is granted.

LEGAL STANDARD

4   Under Federal Rule of Civil Procedure 26(d), a court may authorize early discovery

5   before the Rule 26(f) conference for the parties' convenience and in the interest of justice. FED.

6   R. CIV. P. 26(f)(1), (2). Courts within the Ninth Circuit generally use a "good cause" standard to

7   determine whether to permit such discovery. See, e.g., Apple Inc. v. Samsung Electronics Co.,

8   Ltd., No. 11–CV–01846 (LHK), 2011 WL 1938154, at *1 (N.D. Cal. May 18, 2011); Semitool,

9   Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause may

10 be found where the need for expedited discovery, in consideration of the administration of

11 justice, outweighs the prejudice to the responding party." Semitool, 208 F.R.D. at 276.

12   While discovery normally only takes place after a defendant has been served, where the

13 alleged tortious activity occurs entirely on-line, "[s]ervice of process can pose a special

14 dilemma for plaintiffs ... because the defendant may have used a fictitious name and address in

15 the commission of the tortious acts." Liberty Media Holdings, LLC v. Does 1-62, No. 11-CV-

16 575 MMA (NLS), 2011 WL 1869923, at *2 (S.D. Cal. May 12, 2011) (quoting Columbia Ins.

17 Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999)). In determining whether there is

18 good cause to allow expedited discovery to identify anonymous Internet users named as Doe

19 defendants, courts consider whether: (1) the plaintiff can identify the missing party with

20 sufficient specificity such that the Court can determine that defendant is a real person or entity

21 who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to

22 locate the elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion

23 to dismiss, and; (4) the plaintiff has demonstrated that there is a reasonable likelihood of being

24 able to identify the defendant through discovery such that service of process would be possible.

25 Seescandy.com, 185 F.R.D. at 578-80.

DISCUSSION

27   Pink Lotus has met its burden as set forth above. First, Pink Lotus's agent MCG used its

28 forensic software to identify the unique IP addresses of individuals engaged in P2P sharing of

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1 the Work, noting the date and time of this activity. (See Hansmeier Decl. at ¶¶ 15-17). The

2 forensic analysis included verification of each IP address to ensure that it corresponded to users

3 who actually reproduced and distributed the Work. (See id. at ¶¶ 18-20). Plaintiff also used

4 "geolocation" technology to trace these IP addresses to a point of origin within the state of

5 California. (Compl. at ¶ 3). Pink Lotus has sufficiently shown that Doe Defendants are real

6 persons likely residing in California who may be sued in this Court.

7 Second, Pink Lotus has taken reasonable steps to identify these Doe Defendants but has

8 been unable to do so. MCG's investigation revealed only the IP addresses of Doe Defendants

9 and their affiliated ISPs, noting the date and time of the observed activity. (Hansmeier Decl. at

10 ¶¶ 15-18). Pink Lotus asserts that it has exhausted all other means of identifying Doe

11 Defendants and that ultimate identification depends on a court order authorizing a subpoena of

12 the ISPs. (Application at 8:7-18).

13 Third, this court is satisfied that Pink Lotus's complaint would likely withstand a motion

14 to dismiss. Pink Lotus has sufficiently pled a prima facie case of copyright infringement under

15 the Copyright Act, 17 U.S.C. § 101 *et seq*., and Doe Defendants, having engaged in the same

16 transaction or series of transactions, share common questions of law and fact and are thus

17 properly joined.

18 Fourth, Pink Lotus has shown that there is a reasonable likelihood that its requested

19 discovery will lead to the identification of Doe Defendants. Pink Lotus asserts that ISPs assign a

20 unique IP address to individual users and that the ISP retains records pertaining to those IP

21 addresses for a limited period of time. (Hansmeier Decl. at ¶¶ 16-17).

CONCLUSION

23 Based on the foregoing, the Court GRANTS Pink Lotus's motion for expedited

24 discovery. Accordingly, IT IS ORDERED THAT:

25 1. Pink Lotus may immediately serve Rule 45 subpoenas on the ISPs listed in

26 Exhibit A to the Complaint to obtain information to identify each Doe

27 Defendant, including the name, address, telephone numbers, email addresses,

28 and media access control information. Each subpoena shall have a copy of this
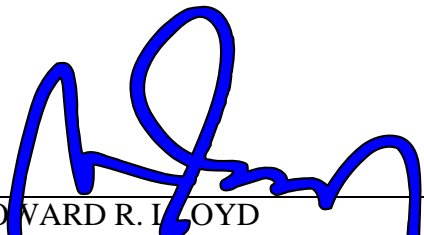
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1   Order attached.

2   2.   Each ISP will have 30 days from the date of service upon them to serve the

3   subscribers of the IP addresses with a copy of the subpoena and a copy of this

4   order. The ISPs may serve the subscribers using any reasonable means, including

5   written notice sent to the subscriber's last known address, transmitted either by

6   first-class mail or via overnight service.

7   3.   Subscribers shall have 30 days from the date of service upon them to file any

8   motions in this court contesting the subpoena (including a motion to quash or

9   modify the subpoena). If that 30–day period lapses without a subscriber

10   contesting the subpoena, the ISPs shall have 10 days to produce the information

11   responsive to the subpoena to Pink Lotus.

12   4.   The subpoenaed entity shall preserve any subpoenaed information pending the

13   resolution of any timely-filed motion to quash.

14   5.   Any ISP that receives a subpoena pursuant to this Order shall confer with Pink

15   Lotus and shall not assess any charge in advance of providing the information

16   requested in the subpoena. Any ISP that receives a subpoena and elects to charge

17   for the costs of production shall provide Pink Lotus with a billing summary and

18   cost reports that serve as a basis for such billing summary and any costs claimed

19   by such ISP.

20   6.   Pink Lotus shall serve a copy of this order along with any subpoenas issued

21   pursuant to this order to the necessary entities.

22   7.   Any information disclosed to Pink Lotus in response to a Rule 45 subpoena may

23   be used by Pink Lotus solely for the purpose of protecting its rights as set forth

24   in its complaint.

25   **IT IS SO ORDERED**

26

27   DATED: June 21, 2011   _____

     HOWARD R. LLOYD
28   UNITED STATES MAGISTRATE JUDGE

C11-02263 HRL Notice will be electronically mailed to:

Brett Langdon Gibbs   blgibbs@wefightpiracy.com

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