THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01644-WYD-MEH

VENICE PI, LLC,

a California Limited Liability Company,

Plaintiff,

v.

JOHN DOES 1-25,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO TAKE LIMITED EXPEDITED DISCOVERY OF INFORMATION PRIOR TO RULE 26(f) CONFERENCE (AUTHORITY INCORPORATED)

Pursuant to Fed. R. Civ. P. 26(d)(1), Plaintiff Venice PI, LLC moves this Court for entry of an order granting it leave to serve a third party subpoena prior to a Rule 26(f) conference in order to obtain information (the "Motion"), and submits the following memorandum in support of this motion.

COMPLIANCE WITH DUTY TO CONFER UNDER D.C.COLO.LCivR 7.1(a)

The Plaintiff's counsel acknowledges his duty under local court rule D.C.COLO.LCivR 7.1(a) to make good faith efforts to reasonably confer with opposing counsel or pro se parties prior to any motion. However, in this case, by virtue of the very nature of this motion requesting leave to pursue expedited discovery in order to determine the true identities of the opposing parties, the Plaintiff's counsel has been unable to confer with opposing counsel or unrepresented parties prior

to the filing of this motion.

I. INTRODUCTION

The Plaintiff seeks leave to serve limited, immediate discovery on the Internet Service Providers ("ISPs") that provided services used by the Doe Defendants so that the Plaintiff may obtain information concerning the Defendants' true identities.[1] The Plaintiff is suing each of the Defendants for using the Internet and the BitTorrent protocol to commit direct copyright infringement.

Because the Defendants used the Internet to commit their infringement, the Plaintiff only knows the Defendants by their use of Internet Protocol ("IP") addresses. The IP addresses were assigned to subscribers of the ISPs by their ISPs. Accordingly, the ISPs can provide information that can lead to the identities of the users of the IP addresses and, implicitly, the Doe Defendants' identities. ISPs maintain internal logs that record the date, time, and customer identity for each IP address assignment made by each ISP. Significantly, the ISPs may maintain these logs for only a short period of time.

The Plaintiff seeks leave of Court to serve a Rule 45 subpoena on the relevant ISPs and any related intermediary ISPs. Any such subpoenas will demand the true name, service address, billing address, telephone number, e-mail address, and Media Access Control ("MAC") address of the subscriber to whom the ISPs assigned an IP address that has been identified by the Plaintiff as being used to infringe its copyrighted work. The Plaintiff will

[1] Even though Fed. R. Civ. P. 26, as amended, effective as of December 1, 2015, allows limited discovery under Fed. R. Civ. P. 34 prior to the Rule 26(f) conference, in this motion, the Plaintiff is seeking information pursuant to Rule 33, rather than production of documents pursuant to Rule 34.

only use this information to prosecute the claims made in its Complaint. Without this information, the Plaintiff cannot serve the Defendants nor pursue this lawsuit to protect its valuable copyright.

II. ARGUMENT

Pursuant to Rule 26(d)(1), except for circumstances not applicable here, absent a court order, a party may not seek information by propounding discovery in advance of a Rule 26(f) conference. However, Rule 26(b) provides: "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action, " and:

> In Internet infringement cases, courts routinely find good cause exists to issue a Rule 45 subpoena to discover a Doe defendant's identity prior to a Rule 26(f) conference, where a plaintiff makes: (1) a prima facie showing of infringement, (2) there is no other way to identify the Doe Defendant, and (3) there is a risk an ISP will destroy its logs prior to the conference.

UMG Recording, Inc. v. Doe, U.S. Dist. LEXIS 79087, 2008 WL 4104214, *4 (N.D. Cal. 2008) (numbers added) (unreported decision), *followed by Malibu Media, LLC v. Doe,* 2013 U.S. Dist. LEXIS 41354, *2 (D. Colo. March 2, 2013) (unreported decision); *see also Arista Records, LLC v. Does 1-19*, 551 F. Supp. 2d 1, 6-7 (D.D.C. 2008), and the cases cited therein, noting the "overwhelming" number of cases where copyright infringement plaintiffs sought to identify "Doe" defendants and courts "routinely applied" the good cause standard to permit discovery. *See Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd. Liability Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002) (the Court may order expedited discovery for good cause).

Some other courts, in the context of a defendant's First Amendment right to privacy,

also require the plaintiff to: specify the discovery requested (a fourth "good cause factor), demonstrate a central need for the subpoenaed information to advance the asserted claims (a fifth factor), and establish that the party's expectation of privacy does not outweigh the need for the requested discovery (a sixth factor). *See Sony Music Entertainment v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004); see also *Avaya, Inc. v. Acumen Telecom Corp.*, No. 10-cv-03075-CMA-BNB, 2011 WL 9293, at *2 (D. Colo. Jan. 3, 2011) (citation omitted).

As shown more fully hereinbelow, because the Plaintiff easily satisfies all of these requirements articulated by federal circuit courts for establishing good cause to serve subpoenas seeking discovery prior to a Rule 26(f) conference, the Plaintiff has demonstrated good cause for this Court to grant this motion for leave.

A. Circuit Courts Uniformly Permit Discovery to Identify John Doe Defendants.

Federal circuit courts have uniformly approved the procedure of suing John Doe defendants and then using discovery to identify such defendants. For example, the First Circuit held in *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 596 (1st Cir. 2011) that "[a] plaintiff who is unaware of the identity of the person who wronged her can . . .proceed against a 'John Doe' . . . when discovery is likely to reveal the identity of the correct defendant." *See also David v. Kelly*, 160 F.3d 917, 921 (2d Cir. 1998) ("Courts have rejected the dismissal of suits against unnamed defendants . . . until the plaintiff has had some opportunity for discovery to learn the identities.").

B. Good Cause Exists to Grant the Motion

Federal circuit courts have articulated six factors that establish "good cause" for expediting discovery prior to a Rule 26(f) conference, and, as shown more fully hereinbelow, because all six

of those factors are present in the instant case, the Court is warranted in granting this motion.

1. The Plaintiff Has Properly Pled Copyright Infringement

The Plaintiff has satisfied the first good cause factor by properly pleading a cause of action for copyright infringement, as follows:

> 48. By using the BitTorrent protocol and a BitTorrent Client and the processes described above, each Defendant copied the constituent elements of the Plaintiff's work that are original.
>
> 49. The Plaintiff did not authorize, permit, or provide consent to the Defendants to copy, reproduce, redistribute, perform, or display its Work.
>
> .
>
> 50. As a result of the foregoing, each Defendant violated the Plaintiff's exclusive right to:
>
> (A) Reproduce the Work in copies, in violation of 17 U.S.C. §§ 106(1) and 501;
>
> (B) Redistribute copies of the Work to the public by sale or other transfer of ownership, or by rental, lease or lending, in violation of 17 U.S.C. §§ 106(3) and 501;
>
> (C) Perform the Plaintiff's Work, in violation of 17 U.S.C. §§ 106(4) and 501, by showing the Work's images; and,
>
> (D) Display the Plaintiff's Work, in violation of 17 U.S.C. §§ 106(5) and 501, by showing individual images of the Work non-sequentially and transmitting said display of the Work by means of a device or process to members of the public capable of receiving the display (as set forth in 17 U.S.C. § 101's definition of "publicly" display.)
>
> 51. Each of the Defendants' infringements was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

Complaint at ¶¶ 48-51 (ECF No. 1). *See* 17 U.S.C. §106; *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003), *cert. den.*, 124 S. Ct. 1069 (2004) ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular

music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright."). Further, the Plaintiff's allegations of infringement are confirmed by forensic evidence compiled, reviewed, and attested to by the Plaintiff's agent, Maverickeye UG. *See* Ex. 1, Declaration in Support of Plaintiff's Motion for Leave ("Maverickeye Declaration") at ¶¶ 7 through 9, referencing Exhibit 1 to the Complaint. Accordingly, the Plaintiff has exceeded its obligation to plead a prima facie case.

2. There Is No Other Way To Obtain the Defendants' True Identities.

Other than by getting the information from the relevant ISPs regarding the persons assigned to the subject IP addresses, there is no other way to obtain the Defendants' true identities. Maverickeye Declaration at ¶ 10. Because there is no other way for the Plaintiff to obtain the Defendants' identities, except by serving a subpoena on the relevant ISPs demanding information regarding the persons assigned to the subject IP addresses, the Plaintiff has established the second good cause factor. *See Sony Music Entm't, Inc. v. Doe,* 326 F. Supp.2d 556-568 (S.D.N.Y. 2004) (denying motion to quash subpoena).

3. There Is A Risk That An ISP Will Destroy Its Logs Prior To The Rule 26(f) Conference.

Logically, it is not possible for Plaintiffs to have a 26(f) conference with the Defendants until the Plaintiff learns their identities. Their identities are only available from the ISPs that assigned the infringing IP addresses, and, unless this Motion is granted, there is a danger that the identifying information could be destroyed or deleted during the normal course of business in advance of any Rule 26(f) conference. Maverickeye Declaration at ¶ 10; *UMG,*

2008 WL 4104214, *5. The Plaintiff's right to sue the Defendants for infringement then would be forever lost. Because a Rule 26(f) conference cannot logically occur until the Plaintiff obtains the identities of persons who were assigned to the relevant IP addresses by their ISPs, the Plaintiff has satisfied the third good cause factor. *UMG*, 2008 WL 4104214, *5.

4. The Plaintiff has Clearly Identified the Information Sought through Discovery.

The Plaintiff seeks to discover from the relevant ISPs the true name, service address, billing addresses, telephone numbers, e-mail addresses, and Media Access Control ("MAC") addresses of the persons assigned to the infringing IP addresses. This is all specific information that is in the possession of the ISPs that assigned the infringing IP addresses. Because the requested discovery is limited and specific, the Plaintiff has satisfied the fourth good cause factor. *Sony*, 326 F. Supp., at 566.

5. The Plaintiff Needs the Subpoenaed Information for Its Claims.

Obviously, without learning the Defendants' true identities, the Plaintiff will not be able to serve the Defendants with process and proceed with this case. The Plaintiff's important statutorily protected property rights are at issue in this lawsuit and, therefore, the equities should weigh heavily in favor of preserving the Plaintiff's rights. Because identifying the Defendants by name is necessary for Plaintiff to advance its asserted claims, the Plaintiff has established the fifth good cause factor. *Id.*

6. The Plaintiffs' Interest in Knowing Defendants' True Identities Outweighs Defendants' Interests in Remaining Anonymous.

The Plaintiff has a strong legitimate interest in protecting its copyrights. The

Defendants are all copyright infringers who have no legitimate expectation of privacy, much less in distributing the copyrighted works in question without permission. *See Interscope Records v. Does 1-14*, 558 F.Supp.2d 1176, 1178 (D. Kan. 2008) (a person using the Internet to distribute or download copyrighted music without authorization is not entitled to have their identity protected from disclosure under the First Amendment); *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) ("computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person—the system operator"); and *Sony Music Entertainment, Inc. v. Does 1–40*, 326 F.Supp.2d 556, 566 (S.D.N.Y. 2004) ("defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission.") Because the Defendants do not have a legitimate interest in remaining anonymous and Plaintiff has a strong, statutorily recognized and protected interest in protecting its copyrights, the Plaintiff has established the sixth good cause factor.

III. CONCLUSION

For the foregoing reasons, the Plaintiff requests that this Court forthwith grant leave to the Plaintiff to issue a Rule 45 subpoena to have served on the ISPs that assigned the IP addresses identified by the Plaintiff as used to infringe its copyrighted work, the motion picture "Once Upon a Time in Venice." Complaint at ¶¶ 11-13 (ECF No. 1). A proposed order is tendered with this motion.

DATED this 10th day of July, 2017.

Respectfully submitted,

/s/ *David J. Stephenson, Jr.*
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *David J. Stephenson, Jr.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

VENICE PI, LLC,

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Plaintiff,

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JOHN DOES 1-25,

Defendants.

DECLARATION OF DANIEL ARHEIDT IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO TAKE LIMITED EXPEDITED DISCOVERY OF INFORMATION PRIOR TO RULE 26(f) CONFERENCE

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1. My name is Daniel Arheidt. I am over the age of 18 and competent to make this declaration. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.

2. I have been retained as as consultant by Maverickeye UG ("MEU"), a company incorporated in Stuttgart and organized and existing under the laws of Germany.

3. MEU monitors peer-to-peer, BitTorrent networks for acts of distribution of the Plaintiff's copyrighted motion picture that is the subject of the above-captioned lawsuit through the use of proprietary MaverikMonitor™ software.

4. When the MaverikMonitor™ software finds an Internet Protocol ("IP ") address distributing the Plaintiff's motion picture, a direct connection is made to that computer device and a portion of the infringing file is downloaded. The MaverikMonitor™ software also records the

exact time of the connection and other available information broadcast by the infringing computer device.

5. This evidence is then saved on a secure server in indexed evidence logs.

6. To confirm the infringing activity, the data downloaded from each infringing computer device is matched to the complete file and a full copy of the motion picture being distributed is compared with a DVD of the original motion picture confirming that the infringing IP address is in fact distributing the Plaintiff's motion picture.

7. The software uses a geolocation functionality to determine the location of each infringing IP address under investigation. The geolocation data for the infringing IP address is set forth in Exhibit 1 of the Complaint.

8. The software reviews other publicly available and searchable data to identify the Internet Service Provider ("ISP") that is providing the Internet service for the subscriber whom it has assigned the infringing IP address, and this data is also set forth in Exhibit 1 of the Complaint.

9. I have reviewed the relevant evidence logs compiled by the MaverikMonitor™ software and can confirm that the records of infringing activity in Exhibit 1 of the Complaint, including records of the IP address, time, hash value, and ISP, accurately reflect instances of actual observed distribution of the Plaintiff's motion picture.

10. Publicly available databases do not permit MEU to identify the names of the ISP subscribers to whom the observed ISPs have assigned the observed IP Addresses, however it is my understanding that records identifying the subscribers who are assigned specific IP addresses at the specific times of the observed infringing activities are normally maintained for a limited

amount of time by those subscribers' ISPs.

DECLARATION

PURSUANT TO 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 6 day of July, 2017.

By: _____
Daniel Arheidt

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01664-WYD-MEH

VENICE PI, LLC,

a California Limited Liability Company,

Plaintiff,

v.

JOHN DOES 1-25,

Defendants.

MINUTE ORDER

Michael E. Hegarty, United States Magistrate Judge.

Before the Court is Plaintiff's Motion for Leave to Take Limited Expedited Discovery of Information Prior to Rule 26(f) Conference [filed July 10, 2017; ECF No. 9]. Plaintiff's motion is **granted** as follows.

Plaintiff's motion alleges that the Doe Defendants, identified only by their Internet Protocol ("IP") addresses, have infringed on Plaintiff's copyrighted work by using the internet and a "BitTorrent" protocol to reproduce, distribute, display, or perform Plaintiff's protected film. Plaintiff requests permission from the Court to serve limited, immediate discovery on the Doe Defendants' Internet Service Providers ("ISPs") prior to the Rule 26(f) conference. The purpose of this discovery is to obtain additional information concerning the identities of the Doe Defendants.

Fed. R. Civ. P. 26(d) proscribes seeking discovery (except under Rule 34, which is not applicable here) before the Rule 26(f) conference. However, this prohibition is not absolute; the Court may authorize discovery upon a showing of good cause. *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd. Liability Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002). "Expedited discovery should be limited, however, and narrowly tailored to seek information necessary to support expedited or preliminary relief." *Avaya, Inc. v. Acumen Telecom Corp.*, No. 10-cv-03075-CMA-BNB, 2011 WL 9293, at *2 (D. Colo. Jan. 3, 2011) (citation omitted).

After review of the motion, the Court finds that Plaintiff establishes good cause for limited expedited discovery. Therefore, Plaintiff's motion is **granted** as follows. The Plaintiff may serve third party subpoenas pursuant to Fed. R. Civ. P. 45 on the identified ISPs with the limited purpose of ascertaining the identities of the Doe Defendants as identified by the twenty-five (25) IP addresses listed in ECF No. 1-1. The subpoenas shall be limited to providing Plaintiff with the name, service address, billing address, telephone number, email address, and Media Access Control address of the Defendant to whom the ISP has assigned an IP address. With each subpoena, Plaintiff shall also serve a copy of this Order. The ISP shall notify the subscriber that his/her identity has been subpoenaed by the Plaintiff. Finally, the Court emphasizes that Plaintiff may only use the information disclosed in response to the subpoenas for the purpose of protecting and enforcing its rights as set forth in its Complaint [ECF No. 1]. The Court cautions Plaintiff that improper use of this information may result in sanctions.

Entered and dated in Denver, Colorado this _____ day of _____, 2017.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge