UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELEKTRA ENTERTAINMENT GROUP, INC., *et al.*,	:	Case No. 1:08-cv-444
	:	Judge Sandra S. Beckwith
Plaintiffs,	:	
	:	Magistrate Judge Timothy S. Black
vs.	:	
DOES 1-6,	:	**ORDER**
Defendants.	:	

This civil action is before the Court on Plaintiffs' motion for leave to take expedited discovery (Doc. 8) pursuant to Rule 26(d) of the Federal Rules of Civil Procedure, and the parties' responsive memoranda (Docs. 9, 10).

For the reasons that follow, the Court **DENIES** Plaintiffs' motion for leave to take expedited discovery; and **GRANTS** Plaintiffs 21 days leave to amend the complaint and effect service of the complaint upon (a) named defendant(s).

I. BACKGROUND AND PROCEDURAL HISTORY

Elektra Entertainment Group, Inc., Capital Records, Inc., BMG Music, and Sony BMG Music Entertainment (collectively, "Plaintiffs") filed this lawsuit on June 27, 2008, alleging copyright infringement. (Doc. 1). On June 29, 2005, Plaintiffs discovered a peer-to-peer ("P2P") infringer using a file-sharing program from the internet IP address 172.158.149.24. *Id.* The Plaintiffs allege that the John Doe defendants wrongfully distributed 450 sound recordings from a computer share folder. *Id.* The Plaintiffs seek injunctive relief, statutory damages, and costs. (Doc. 1).

This is the second suit involving this alleged infringement. The first suit in this Court, Case No. 1:07-cv-569, named David Licata as defendant. Licata's internet service provider, AOL, had identified Licata as the account holder responsible for the IP address identified by the Plaintiffs. This earlier case is still pending upon a hearing on Plaintiffs' motion to voluntarily dismiss, which motion defendant Licata opposes. Licata seeks a dismissal with prejudice so that he can seek attorney fees as a prevailing party under Section 505 of Title 15— the Copyright Act. The hearing is scheduled for Thursday, February 19, 2009 at 10:00 a.m.[1]

In the earlier case, Licata stated that "he in fact has no knowledge as to who the actual infringer may be and is unable to testify as to the identity of the person who downloaded or uploaded files." (Doc. 19, Ex. 3C, 1:07-cv-569). In response to interrogatories, Licata identified the members of his household by name and age. (Doc. 19, Ex. 8, 1:07-cv-569).

The Plaintiffs filed the instant suit against six John Does on June 27, 2008. Service on the Does has not been effected. On November 12, 2008, the Court ordered Plaintiffs to show cause why the complaint should not be dismissed for failure of service of process. In response, Plaintiffs now move for expedited discovery to determine the identity of the Does.

Licata, in response, seeks: (1) to consolidate this action with the prior action,1:07-cv-569; and (2) thereby to reassign this case to Senior Judge Herman J. Weber (the judge presiding in the earlier case); and (3) to overrule Plaintiffs' motion for expedited discovery; and (4) to dismiss the complaint for failure to secure service within 120 days of the filing of this action.[2]

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[1] Licata's request to consolidate is premature and is declined without prejudice.

[2] Whether Licata has standing is unclear. But Licata's standing need not be resolved in order to decide this motion.

II. STANDARD OF REVIEW

Rule 26(d) allows a plaintiff, with the Court's permission or by stipulation, to seek expedited discovery. Federal Rule of Civil Procedure 26(d) provides in part: "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except...when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26(d).

But expedited discovery is not the norm. A party seeking expedited discovery must show good cause for departing from the usual discovery procedures. *Arista Records, LLC v. Doe*, 2007 U.S. Dist. LEXIS 97283 (S.D. Ohio Nov. 5, 2007) (permitting plaintiff record companies to subpoena internet service provider for the limited purpose of identifying Doe defendants so that plaintiffs could effect service of process); *Whitfield v. Hochsheid*, No. C-1-02-218, 2002 U.S. Dist. LEXIS 12661, at *3-4 (S.D. Ohio July 2, 2002) (expedited discovery permitted for the limited purpose of resolving class certification).

III. ANALYSIS

A. Good Cause Under Rule 26(d)

The United States Court of Appeals for the Sixth Circuit has not specifically addressed good cause under Rule 26(d), but this Court has applied a good cause standard. *Arista Records, LLC v. Doe*, *supra*; *Whitfield v. Hochsheid*, *supra*.

Good cause for expedited discovery is contingent on urgency. "The court must protect defendants from unfairly expedited discovery." *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). Federal Rule of Civil Procedure 30 illustrates this principle. It allows parties to depose a witness prior to the scheduling conference when the deponent is expected to be unavailable for examination. Preliminary injunctions may also justify expedited discovery. *Ellsworth Associates,*

Inc. v. United States, 917 F. Supp. 841, 844 (D.D.C. 1996) (plaintiff challenged constitutionality of upcoming government contract bidding process); *Revlon Consumer Products Corp. v. Jennifer Leather Broadway, Inc.*, 858 F. Supp. 1268, 1269 (S.D.N.Y. 1994) (trademark holder sought injunction prohibiting defendant from publishing ads that used the plaintiff's mark). Expedited discovery may also be appropriate when evidence may be consumed or destroyed. *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne, Ltd. Liability Co.*, 204 F.R.D. 675, 676 (expedited inspection of commodity beans must begin before beans were sold or consumed). In each case, good cause is found in the urgency to prevent injury or to obtain evidence before it is lost.

Here, the Plaintiffs have not shown good cause for expedited discovery. The long duration of the case, and the timing of the Plaintiffs' filings, discount any claim of urgency. The alleged infringement occurred on June 29, 2005. The first suit was filed on July 24, 2007. Licata disclosed the names of his family members by April 4, 2008. The instant suit was filed on June 27, 2008. The Plaintiffs moved for expedited discovery on November 26, 2008—152 days after the suit was filed, and 32 days after service was to be effected. The timing of these events does not indicate urgency.

The Plaintiffs cannot create urgency by naming Doe defendants. The use of Doe defendants is disfavored by the federal courts. *Yates v. Young*, 772 F.2d 909 (6th Cir. 1985); *see also Schiff v. Kennedy*, 691 F.2d 196 (4th Cir. 1982); *Gillespie v. CiviFebruary 4, 2009letti*, 629 F.2d 637 (9th Cir. 1980); *Maclin v. Paulson*, 627 F.2d 83 (7th Cir. 1980). The use of Doe defendants is only proper until the plaintiff can discover the true name of the defendant. "Ignorance must be real and not feigned; it must not be wilful ignorance, or such as might be removed by mere inquiry or a resort to means of information easily accessible." *Kentucky*

Silver-Min. Co. v. Day, 14 F.Cas. 351, 352 (C.C.Nev. 1873) (quoting *Rosencrantz v. Rogers*, 40 Cal. 489 (Cal. 1871)).

The Plaintiffs assert that Licata has clearly implicated one or more of his family members. (Doc. 10). The Plaintiffs, based on Licata's responses to interrogatories, know the names of Licata's family members. Nothing in the Plaintiffs' memorandum sufficiently explains why the identified family members are not named defendants and timely served.

The Plaintiffs rely on several Doe P2P-file-sharing cases in which expedited discovery was permitted: *Arista Records, LLC v. Does 1-15*, No. 2:07-cv-450 (S.D. Ohio Jun. 12, 2007); *Capitol Records, Inc. v. Does 1-250*, No. 04 CV 472 (LAK) (S.D.N.Y. Jan. 26, 2004); *Sony BMG Music Ent't v. Does 1-2*, Civil Action No. 5:04-cv-1253 (NAM/GHL) (N.D.N.Y. Nov. 5, 2004); *Virgin Records Am., Inc. v. Does 1-3*, Civil Action No. 3-04-cv-701 (JCH) (D. Conn. April 29, 2004).[3] But none of these cases are factually similar to the current case. All of the cited cases order the *internet service provider* to identify the alleged infringer.

Section 512(h) of Title 17 provides a narrow form of expedited discovery. It permits a copyright owner to request from the clerk of any United States district court a subpoena for a *internet service provider* to identify an alleged infringer. This power is not a blanket right to subpoena. It is limited to subpoenaing the *internet service provider*. 17 USC § 512(h).

The Plaintiffs have already used this form of expedited discovery They have successfully subpoenaed AOL, the internet service provider, which has identified David Licata as the person responsible for the account. The instant motion for expedited discovery does not involve an internet service provider. The Plaintiffs instead seek to depose Licata, his wife, and two of his

[3] Copies of these Orders are attached to the Plaintiffs' motion as Exhibit C. (Doc. 8).

children. (Doc. 10). The expedited discovery permitted under the 17 U.S.C. 512(h) does not apply to these potential defendants or witnesses. Section 512 is explicitly limited to internet service providers.

Accordingly, Plaintiffs have not evidenced good cause for expedited discovery.

B. Dismissal Under Rule 4(m)

Under the Federal Rules of Civil Procedure, Plaintiffs are required to effect service upon defendants within 120 days of filing the complaint. Fed. R. Civ. P. 4(m). Otherwise, "on motion or on its own after notice to the plaintiff —[the court] must dismiss the action without prejudice against that defendant *or order that service be made within a specified time*." *Id* (emphasis added).

Rule 4(m) creates a two-part framework. First, if good cause is shown, then the time for service shall be extended. *Id.* Second, if good cause is not shown, the "court must either (1) dismiss the action or (2) direct that service be effected within a specified time." *Osborne v. First Union Nat'l Bank*, 217 F.R.D. 405, 408 (S.D. Ohio 2003). In other words, the court, in its discretion, may extend the 120-day period for Plaintiffs to effect service, even absent a showing of good cause. *Id.*; *Wise v. DOD*, 196 F.R.D. 52, 56 (S.D. Ohio 1999).

Such exercise of discretion is appropriate in this case. First, the Plaintiffs withheld moving for expedited discovery in "hopes of resolving this matter without additional discovery or motion practice, but ... have been unable to reach a settlement." (Doc. 7). Efforts to settle should not be discouraged. Furthermore, the opposition to the voluntary dismissal of the earlier suit made settlement harder. Second, the Plaintiffs, armed with the names and ages of all the members of the Licata household, can promptly effect service against one or more of them. A short

extension of time will not unduly delay the proceedings. Last, Licata's response to the Plaintiffs' motion for expedited discovery indicates that the potential defendants are aware of the complaint. An extension will not unreasonably prejudice these potential defendants.

Accordingly, the Court chooses to specify a time within which service shall be made on (a) named defendant(s). *See* Fed. R. Civ. P. 4(m).

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiffs' motion for leave to take expedited discovery (Doc. 8); and **GRANTS** Plaintiffs 21 days leave to amend the complaint and effect service of the complaint upon (a) named defendant(s).

IT IS SO ORDERED.

Date: 2/5/09
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Timothy S. Black
United States Magistrate Judge