

ORIGINAL FILED
ON OCT 07 2011
IN THE OFFICE OF
CIRCUIT COURT DADE CO
PAUL BASTON

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL DISTRICT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO.

OPENMIND SOLUTIONS, INC., a foreign corporation,

11-32617 CA 20

Plaintiff,

vs.

**MOTION FOR INTERNET SERVICE
PROVIDERS TO DISCLOSE
IDENTIFYING INFORMATION OF
UNKNOWN DEFENDANTS**

JOHN DOES 1-313,

Defendants.

Plaintiffs, OpenMind Solutions, Inc. ("Plaintiff"), hereby moves for entry of an Order requiring certain internet service providers to respond to Plaintiff's subpoenas by disclosing information sufficient to identify and serve Defendants, John Does 1-313. The grounds for this motion shall be set forth in a supporting Memorandum of Law to be filed with this Court.

Respectfully submitted,

OpenMind Solutions, Inc.

DATED: October 4, 2011



By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on 10-6-, 2011, I served the foregoing document
by Hand Delivery on the persons set forth on the service list.

By: 
Joanne Diez, Esq.

SERVICE LIST

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Dade County Courthouse
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Miami, FL 33131

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CASE NO.

11-32617 CA 20

OPENMIND SOLUTIONS, INC., a foreign corporation,

Plaintiff,

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JOHN DOES, 1-313,

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**MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR INTERNET SERVICE
PROVIDERS TO DISCLOSE
IDENTIFYING INFORMATION OF
UNKNOWN DEFENDANTS**

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CIVIL DIVISION**

I. INTRODUCTION

Through this pure bill of discovery, Plaintiff, the owner of copyright to various motion pictures seeks to learn Defendants' identities from their respective Internet Service Providers ("ISP") so that Plaintiff may file copyright infringement suits against them. While a third party subpoena served upon the ISPs would normally suffice, here, a court order compelling the ISPs to comply with the subpoenas that Plaintiff will serve on them is necessary because many of the ISPs are "cable Providers" within the meaning of 47 U.S.C. § 551(c)(2)(B) and a "court order" is required to compel a "cable provider" to disclose the identity of its subscribers under that statute.

Since Defendants used the Internet to commit their infringements, Plaintiff only knows Defendants by their Internet Protocol ("IP") addresses. Defendants' IP addresses were assigned to the Defendants by their respective ISPs. Accordingly, the ISPs can use the IP addresses to identify the Defendants. Indeed, many of the ISPs maintain internal logs, which record the date,

time and customer identity for each IP address assignment made by that ISP. Significantly, many of the ISPs only maintain these logs for a very short period of time.

Plaintiff seeks an order requiring the ISPs to respond to a subpoena that will be served on the ISPs requiring the ISPs to disclose the true name, address, telephone number, e-mail address and Media Access Control (“MAC”) address of the Defendants to whom each ISP issued an IP address.¹ Plaintiff will only use this information to resolve its copyright infringement dispute with the Defendants. Without this information, Plaintiff cannot name the Defendants in future federal court copyright infringement suits nor immediately serve those Defendants to pursue any such lawsuit to protect its valuable copyrights.

As explained below, Plaintiff is indisputably entitled to learn the identity of the Defendants and a pure bill of discovery is a proper tool for this purpose. Accordingly, this Court should grant this motion.

II. FACTUAL BACKGROUND

Plaintiff is the owner of copyrights to those motion pictures set forth next to Plaintiff’s name on “Exhibit B” to Plaintiff’s Complaint. As alleged in the Complaint, Plaintiff has actionable claims for direct and contributory copyright infringement against each of the Defendants, which it intends to bring in a future federal court copyright infringement cases, based on each Defendant’s use of the “BitTorrent” protocol to illegally download, reproduce, redistribute and perform one of Plaintiff’s Works.

Although Plaintiff does not know the Defendants’ true identities, Plaintiff’s forensic investigator identified each of the Defendants by a unique Internet Protocol (“IP”) address

¹ A MAC address is a number that identifies the specific computer used for the infringing activity.

assigned to that Defendant by its respective ISP at the date and time of the infringing activity. A declaration by Plaintiff's investigator is attached to the Complaint. Many ISPs maintain internal logs which record the date, time, and customer identify for each IP address assignment made by that ISP. Accordingly, these ISPs can use the IP address provided by Plaintiff to identify the Defendants. Significantly, however, many of the ISPs only retain the information necessary to correlate an IP address to a person for a short amount of time. Accordingly, time is of the essence with respect to getting the subpoenas to the ISPs so that the ISPs may preserve and maintain this information necessary to identify the Defendants.

III. ARGUMENT

A. Plaintiff May Obtain the Identities of the Defendants Through a Pure Bill of Discovery

As Plaintiff requests here, a pure bill of discovery may "be used to identify potential defendants." Payne v. Beverly, 958 So.2d 1112, 1114 (Fla. Dist. Ct. App. 2007). Accord Sunbeam Television Corp. v. Columbia Broadcasting System, Inc., 694 F. Supp. 889, 891-892 (S.D. Fla. 1988) (a pure bill of discovery "exists for a specific purpose to enable a Plaintiff to determine the proper parties against whom, and the proper legal theories under which, to proceed in a separate action for relief.") "In this case the plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs." Gill v. Smith, 117 Fla. 176, 180 (Fla. 1934).²

² While a pure bill of discovery is an old common law cause of action, "Florida Courts have specifically stated that the Florida Civil Rules of Discovery do not extinguish the long-standing and distinct right to

While Plaintiff may also obtain the Defendants' identities through a federal copyright suit against John Doe defendants, that does not prohibit the instant claim for a pure bill of discovery because "[t]he fact that there are legislative acts separately authorizing a discovery at law or in equity in other ways than by a bill in equity in the form of a pure bill for discovery is immaterial." First Nat. Bank of Miami v. Dade-Broward Co., 125 Fla. 594, 597 (Fla. 1937); Carner v. Ratner, 207 So.2d 310, 311 (Fla. Dist. Ct. App. 1968) (same). Moreover, here, due to the large number of infringers, a bill of discovery is procedurally advantageous for a variety of reasons.

A pure bill of discovery may seek the identities of future Defendants over which federal courts have exclusive jurisdiction. Indeed, the Court in Sunbeam rejected the Defendants' agreement "that if one of the ultimate objects of the state law discovery proceeding is to facilitate the prosecution of an action over which a Federal Court has exclusive jurisdiction, then the Federal Court has jurisdiction over the discovery proceeding itself." 694 F. Supp. at 892. The Sunbeam court reasoned that "Florida has defined this proceeding [a pure bill of discovery] as distinct from the matters as to which the Plaintiffs seeks discovery. Upon answering the Bill, the proceeding terminates. A subsequent suit for relief is an entirely separate proceeding." Id. Accordingly, Plaintiff's assertion that it intends to sue the Defendants in future federal court copyright infringement suits is sufficient for proposes of stating a cause of action in a pure bill of discovery under Florida law.

Plaintiff may also use a pure bill of discovery to obtain information from parties other than prospective Defendants, i.e., from the ISPs in this case. See Sunbeam, 694 F. Supp. at 892

file a Bill of Discovery in equity." Sunbeam Television Corp. v. Columbia Broadcasting System, Inc., 694 F. Supp. 889, 891-892 (S.D. Fla. 1988).

(rejecting the argument that only putative Defendants may be subjects of pure bill of discovery as a “gross overstatement of Florida law and internally inconsistent with the purpose of the bill,” i.e., “to ascertain, as a matter of equity who an injured party may sue and under what theory”); Gill, 117 Fla. at 180-87 (citing examples of use of pure bill of discovery against parties other than prospective defendants).

This Court has jurisdiction over the Defendants because “[c]opyright infringement is a tortious act within the meaning of § 48.193(1)(b).” Foreign Imported Productions and Publishing, Inc v. Group Industrial Hotelero, 2008 WL 4724495, *5 (S.D. Fla. 2008). “The Florida Supreme Court has made explicit that a defendant’s physical presence is not required to commit a tortious act in Florida. If copyright infringement occurs on a website that is accessible in Florida, § 48.193(1)(b) is met” Id. (citations omitted). Here, each of the Defendants committed a substantial and material part of the tortious act of copyright infringement in Florida by sending a piece of a movie into Florida and by receiving a piece of a movie from Florida. Accordingly, Florida may properly exercise jurisdiction over the Defendants.

In short, Plaintiff is using the pure bill of discovery for one of its core purposes, to identify the names of the people who have harmed it, and there is no legal or equitable reason why Plaintiff should be prohibited from seeking the Defendants’ identities from their respective ISPs.

B. A Federal Statute Requires a Court Order for Cable Providers

While normally a subpoena duces tecum for deposition under Fla. R. Civ. P. 1.410 and 1.320 would suffice to compel the ISPs to disclose the identities of their infringing subscribers, here, a court order is necessary because 47 U.S.C § 551(c)(2)(B) states:

[a] cable operator may disclose such [personal identifying] information if the disclosure is . . . made pursuant to a court order authorizing such disclosures, if the subscriber is notified of such order by the person to whom the order is directed[.]

and many of the ISPs to whom a subpoena will be served qualify as a “cable operator.”³ Since an order is necessary, this Court should know that, when provided with identical evidence, federal courts routinely find that “good cause” exists to grant orders permitting a copyright owner to serve a third party subpoena on a defendant’s ISP in advance of a Fed. R. Civ. P. 26(f) conference. See Arista Records, LLC v. Doe 3, 604 F.3d 110 (2d Cir. 2010) (citing Sony Music Entertainment Inc. v. Does 1-40, 326 F. Supp. 2d. 565, 564-65 (S.D.N.Y 2004) and a long list of other cases). Indeed, within the last month, five (5) federal court judges in the Southern District of Florida have approved the issuance of subpoenas to ISPs in cases that undersigned is managing. Obtaining this information through a pure bill of discovery is simply another procedural mechanism, arguably better for numerous reasons, for obtaining the infringing Defendants’ identities.

IV. CONCLUSION

For all the forgoing reasons, the Court should enter an order granting this motion.

³ 47 U.S.C. § 522(5) states:

the term “cable operator” means any person or group of persons

(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or

(B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

Respectfully submitted,

OpenMind Solutions, Inc.

DATED: October 4, 2011



By: _____

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on 10-6-, 2011, I served the foregoing document by hand-delivery on the persons set forth on the service list.

By: 
Joanne Diez, Esq.

SERVICE LIST

Each of Defendants by serving the Clerk of Courts as is required under Fla. R. Civ. P. 1.080 when the address of the Defendants is unknown.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL DISTRICT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

Case No.

77-32617 CA 20

OPENMIND SOLUTIONS, INC., a foreign corporation,

Plaintiff,

vs.

**DECLARATION OF
PETER HANSMEIER ATTESTING TO
THE DEFENDANTS' INFRINGEMENT**

JOHN DOES 1- 313,

Defendants.

ORIGINAL FILED
ON OCT 07 2011
IN THE OFFICE OF
CIRCUIT COURT DADE CO
CARL BENSER

I, PETER HANSMEIER, HEREBY DECLARE:

1. My name is Peter Hansmeier.
2. I am over the age of 18 and am otherwise competent to make this declaration.
3. 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.

4. I am employed by Media Copyright Group ("MCG"), a company organized and existing under the laws of the State of Minnesota.

5. Among other things, MCG is in the business of providing forensic investigation services to copyright owners.

6. As part of my duties for MCG, I routinely identify the Internet Protocol ("IP") addresses that are being used by those people that are using the BitTorrent protocol to reproduce, distribute, display or perform copyrighted works.

7. An IP address is a unique numerical identifier that is automatically assigned to an internet user by the user's Internet Service Provider ("ISP").

8. ISPs keep track of the IP addresses assigned to their subscribers.

9. Only the ISP to whom a particular IP address has been assigned for use by its subscriber can correlate the IP address to a real person, the subscriber of the internet service.

10. From time to time, a subscriber of internet services may be assigned different IP addresses from their ISP. Accordingly, to correlate a person with an IP address, the ISP also needs to know when the IP address was being used.

11. Many ISPs only retain the information sufficient to correlate an IP address to a person at any given time for a very limited amount of time.

12. Plaintiff retained MCG to identify the IP addresses that are being used by those people that are using the BitTorrent protocol and the internet to reproduce, distribute, display or perform Plaintiff's copyrighted works.

13. MCG gave me the task of implementing, monitoring, analyzing, reviewing and attesting to the results of the investigation.

14. During the performance of my duties, I used forensic software named BitTorrent Auditor v2.0 and related technology enabling the scanning of peer-to-peer network for the presence of infringing transactions.

15. BitTorrent Auditor v2.0 was correctly installed and initiated on a server located in the United States of America.

16. I personally extracted the data resulting from the investigation.

17. After examining the evidence logs, I isolated the transactions and the IP addresses being used on the BitTorrent peer-to-peer network to reproduce, distribute, display or perform Plaintiffs' copyrights work.

18. Through each of the transactions, the computers using the IP addresses identified on Exhibit A to the Complaint were connected to the investigative server in order to transmit a full copy, or a portion thereof, of a digital media file identified by the hash value set forth in Exhibit A to the Complaint.

19. The IP addresses, hash values and hit dates contained Exhibits A-D to the Complaint correctly reflect what is contained in the evidence logs.

20. The peers using the IP addresses set forth on Exhibit A were all part of a "swarm" of peers that were producing, distributing displaying or performing the copyrighted work identified on Exhibit B (the "Works").

21. I analyzed each BitTorrent "piece" distributed by each IP address listed on Exhibit A and verified that reassembling the pieces using a specialized BitTorrent Client results in a fully playable digital motion picture.

22. I was provided with a control copy of the copyrighted works identified on Exhibit B. I viewed each of the Works side-by-side with the digital media file identified by the hash value set forth on Exhibit B and determined that they were identical, strikingly similar or substantially similar.

23. Once provided with the IP address, plus the date and time of the detected and documented infringing activity, ISPs can use their subscriber logs to identify the name, address, email address, phone number, and Media Access Control number of the subscriber.

FURTHER DECLARANT SAYETH NAUGHT.

DECLARATION

PURSUANT TO FLORIDA STATUTES § 92.525, under penalties of perjury, I declare that I have read the foregoing document and the facts stated in it are true.

Executed on October 4, 2011.

PETER HANSMEIER

By: _____

A handwritten signature in black ink, appearing to read 'P. Hansmeier', is written over a horizontal line.

EXHIBIT A