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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,
Plaintiff,

No. C 15-04443 WHA

v.

JOHN DOE SUBSCRIBER ASSIGNED IP
ADDRESS 98.210.99.78,
Defendant.

**ORDER GRANTING
MOTION TO DISMISS**

INTRODUCTION

In this copyright infringement action involving online piracy of pornographic films, defendant moves to dismiss the complaint for insufficient service of process. For the reasons stated below, defendant’s motion is **GRANTED**.

STATEMENT

Since September 2015, plaintiff Malibu Media, LLC has filed 178 copyright infringement actions in this district. The complaints in all such actions are virtually identical. In this action, Malibu Media accuses defendant, an Internet subscriber assigned IP address 98.210.99.78 by his Internet service provider, Comcast Communications, Inc., of copying and distributing forty-two of Malibu Media’s copyrighted pornographic films between May 2014 and July 2015. As with each of Malibu Media’s actions, it accuses defendant of using a digital file-sharing platform known as BitTorrent to download, copy, and distribute these works.

1 When it commenced this action on September 27, 2015, Malibu Media could only
2 identify defendant by his Internet Protocol address, which is a numerical identifier assigned to
3 each Internet service subscriber by Comcast. In November 2015, Malibu Media sought leave to
4 serve a third-party subpoena on Comcast for defendant's name and address for the purpose of
5 effectuating service, which leave was granted, subject to a protective order requiring Malibu
6 Media to file any and all documents including defendant's identifying information under seal,
7 with all such information redacted on the public docket.

8 Malibu Media issued the subpoena two days later. In December, defendant retained
9 counsel, who emailed Malibu Media to advise of the representation, although Malibu Media
10 had not yet received Comcast's response.

11 On January 6, Malibu Media received Comcast's response. It filed a motion for leave to
12 file an amended complaint (identifying defendant by name) under seal on January 22, which
13 leave was granted on January 26 (Dkt. Nos. 15, 17). The deadline to effect service pursuant to
14 Rule 4(m) was January 25, but the order granting the sealing motion extended that deadline to
15 February 6. Malibu Media's process server served defendant on February 7. Malibu Media
16 never requested a further extension.

17 Defendant now moves to dismiss the action for insufficient service of process. This
18 order follows full briefing and oral argument.

19 ANALYSIS

20 Prior to its amendment in December 2015, Rule 4(m) set forth the time limit for service
21 of process as follows:

22 If a defendant is not served within 120 days after the complaint is
23 filed, the court — on motion or on its own after notice to the
24 plaintiff — must dismiss the action without prejudice against that
25 defendant or order that service be made within a specified time.
26 But if the plaintiff shows good cause for the failure, the court must
27 extend the time for service for an appropriate period. This
28 subdivision (m) does not apply to service in a foreign country
under Rule 4(f), 4(h)(2), or 4(j)(1).*

* On December 1, 2015, Rule 4(m) was amended to set the deadline as 90 days after the complaint is filed. This order applies Rule 4(m) as it stood on the date of the filing of the complaint.

1 Malibu Media concedes that it failed to timely serve defendant by the extended deadline
2 of February 6 and failed to request a further extension. It further acknowledges that, due to a
3 scrivener's error, the return of service erroneously stated that service occurred at 4:23 a.m.,
4 rather than 4:23 p.m. It argues that good cause exists to either forgive the untimely service or to
5 permit Malibu Media another opportunity to perfect service.

6 It took Malibu Media eighteen days from receiving defendant's identifying information
7 before it moved to file its amended complaint under seal, and it blames *defense counsel* for that
8 delay. Malibu Media contends in its brief (but not in any sworn statement) that its counsel
9 asked defense counsel "on a couple occasions" beginning on January 6 (after learning
10 defendant's identity) if defense counsel would accept service for defendant and further contends
11 that defense counsel's failure to respond until January 21 led to these delays (Pl.'s Opp. at 3).
12 Defense counsel, in a sworn declaration, avers that only one such communique occurred — on
13 January 20. Defense counsel responded on January 21 that they were not authorized to accept
14 service (Ranallo Decl. ¶¶ 6–7).

15 Malibu Media's unsworn claims that defendant dodged service also fall flat. Malibu
16 Media notes that on one occasion, defendant's wife answered the door, but the process server
17 declined to serve defendant via his wife, allegedly to "avoid service issues" (Pl.'s Opp. at 4).
18 The remaining descriptions, involving attempts when no one was home or when no one
19 answered the door, are vague and unpersuasive. (For example, there is no indication that the
20 process server ever attempted service anywhere other than defendant's home.)

21 Counsel's lack of diligence pervades even the opposition to this motion. Malibu Media
22 notes that it "can obtain" an affidavit from its process server confirming that defendant was
23 dodging service, but it elected to rest only on unsworn attorney argument in opposing this
24 motion. Similarly, it noted that it *will* submit an amended return of service correcting the
25 scrivener's error on the return of service. Three months after filing its opposition, Malibu
26 Media still has not done so (Pl.'s Opp. at 4 n.1, 5).

27 Malibu Media must bear the cost of its complete lack of diligence. Malibu Media cites
28 *Electric Specialty Co. v. Road & Ranch Suppl, Inc.*, 967 F.2d 309, 314 (9th Cir. 1992), for the

1 proposition that Rule 4(m) is not intended to create “unnecessary technicality in connection
2 with service of process,” but is instead “designed to provide maximum freedom and flexibility
3 in the procedures for giving all defendants notice of commencement of the action”

4 Although that flexibility is important, Rule 4(m) also serves the function of requiring diligence
5 on the part of plaintiff’s counsel. To hold otherwise would swallow the requirement of good
6 cause. *See Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

7 In *United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of*
8 *Guess?, Inc.*, 366 F.3d 767, 773 (9th Cir. 2004), our court of appeals vacated a district court’s
9 decision to dismiss an action case for untimely service. There, the district court was held to
10 have abused its discretion by failing to consider as part of its good cause analysis whether the
11 defendant suffered any prejudice due to untimely service or whether the plaintiff would suffer
12 any prejudice if the case were to be dismissed (such as whether the statute of limitations would
13 expire). Nevertheless, that decision acknowledged that “[l]ack of prejudice *by itself* is not
14 sufficient to establish good cause.” *Id.* at 773, n.2.

15 Here, Malibu Media would suffer minimal prejudice — it would simply need to re-file
16 the case and pay a new filing fee. Indeed, Malibu Media does not even argue that it would
17 suffer any prejudice and notes that “the Court has the discretion to grant Defendant’s requested
18 relief” (Pl.’s Opp. at 2). On the other side of the equation, our defendant would suffer moderate
19 prejudice, in that allowing this action to proceed would reward Malibu Media’s counsel’s lack
20 of diligence, both in effecting service and in opposing this very motion, and it would encourage
21 that diligence as the case progresses. Such a result is especially troubling given that counsel’s
22 lack of diligence is a chronic issue throughout Malibu Media’s numerous cases in this district.
23 Thus, this order holds that the proper remedy for Malibu Media’s complete failure to show good
24 cause for its delay is to dismiss this action without prejudice.


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CONCLUSION

For the reasons stated above, defendant's motion to dismiss is **GRANTED**. This action is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Dated: June 20, 2016.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE