UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TWENTIETH CENTURY FOX FILM CORP., *et al*.	)	
Plaintiffs,	)	
v.	)	No. 1:14cv362
MEGAUPLOAD LIMITED, *et al*.,	)	(LO / IDD)
Defendants.	)	

MOTION OF DEFENDANT MEGAUPLOAD LTD.
TO EXTEND THE STAY PENDING A PARALLEL CRIMINAL PROSECUTION

Defendant Megaupload Limited ("Megaupload") hereby moves for an order extending the stay entered in this action and, in support thereof, states as follows:

1. Plaintiffs filed this action on April 7, 2014, alleging claims for direct and secondary copyright infringement (Dkt. No. 1, *Complaint*). The defendants in this civil action are Megaupload, Vestor Limited ("Vestor"), Kim Dotcom ("Dotcom"), Mathias Ortmann ("Ortmann"), and Bram van der Kolk ("van der Kolk"), all of whom are foreign nationals (*Id*., *Complaint* ¶¶ 19 – 23).

2. Megaupload and the other defendants in this civil action also have been indicted for racketeering, criminal copyright infringement, and other alleged crimes. *United States v. Kim Dotcom, et al*., No. 1:12-cr-00003-LO (E.D. Va. filed Jan. 5, 2012) ("*Criminal Action*"). The *Criminal Action* is still pending.

3. Defendants Megaupload, Dotcom, Vestor, and Ortmann also have been sued in two other civil actions now pending in this Court related to the same conspiracy alleged in the *Criminal Action*. *Microhits, Inc. v. Megaupload, Ltd*., No. 1:12cv327-LO/IDD (E.D. Va. filed

Mar. 21, 2012) ("*Microhits Action*"); *Warner Music Group Corp. v. Megaupload, Ltd.*, No. 1:14cv374-LO/IDD (E.D. Va. filed Apr. 10, 2014) ("*Warner Music Action*"). All three of these civil actions have been stayed. In particular, this action has been stayed by orders entered July 29, 2014 (Dkt. No. 43), April 1, 2015 (Dkt. No. 45), and September 29, 2015 (Dkt. No. 47). These plaintiffs all claim to be "crime victims" of the so-called "Megaupload Conspiracy."

4. In addition, two civil forfeiture actions are now pending against assets that were seized from Defendants and others, which are located in New Zealand and Hong Kong, *see United States v. All Assets, etc.*, No. 1:14cv969-LO-MSN (E.D. Va. Apr. 14, 2015) (Dkt. No. 112, separate final judgment as to certain assets), *appeal docketed sub nom. United States v. Finn Batato, et al.*, No. 1:15-1360 (4th Cir. docketed Apr. 8, 2015); and in Australia, *see United States v. All Assets, etc.*, No. 1:15cv1106-LO-MSN (E.D. Va. filed Aug. 28, 2015). In the first action, the Court forfeited virtually all defendant-assets located in New Zealand and Hong Kong to the United States, which ruling is on appeal (and which was argued on March 22, 2016). The second action has been stayed pending the outcome of the claimants' appeal of the first action.

5. The individual Defendants named in this action who are residing in New Zealand have been opposing extradition. After protracted proceedings, a trial level court in New Zealand has found those individual Defendants subject to extradition, which ruling is on appeal. The appeal is expected to be heard in August 2016.

6. Defendants contacted Plaintiffs and asked them to consent to extend the current stay for an additional six months (**Exhibit A**, Mar. 4, 2016 email). Plaintiffs indicated they would not consent unless Defendants agreed to allow Plaintiffs to immediately serve a subpoena on a third-party, Cogent Communications ("Cogent"), to obtain a mirrored copy of Megaupload's users' data cached on servers Megaupload had leased from Cogent (*Id.*, Mar. 23,

2016 emails). As explained below, that demand is improper for several reasons, and the parties have been unable to agree upon terms for extending the stay. Therefore, Defendants now file this motion to extend the stay as a contested matter, and Defendants understand that Plaintiffs will file a response and also seek leave to serve a subpoena on Cogent. Herein, Megaupload explains its position.

7. Cogent is a provider of Internet bandwidth and leased servers to some of the world's largest Internet and cloud storage service providers ("ISP"). Cogent provided bandwidth and leased servers to Megaupload. *See Criminal Action*, ECF No. 34, *Superseding Indictment* ¶ 40. Megaupload, in of the course of providing automated cloud storage services, had multiple terabytes of its user data cached on leased servers located at Cogent (although the government has apparently not sought any of it).

8. The cached data belongs to Megaupload's users. Megaupload was an ISP to its users, who entrusted it with their data, and, by federal statute, Megaupload has certain legal obligations to its users, including confidentiality and privacy. As Megaupload explained to Plaintiffs in a lengthy meet-and-confer email, that there are numerous issues and legal risks implicated by Plaintiffs' proposal to serve a subpoena on Cogent to obtain a mirrored copy of the cached user data, and Defendants proposed an alternative method of proceeding:

> We ask that your clients reconsider their position on requiring purported "limited" discovery as a condition on stipulating to a stay extension. … The "limited" discovery your clients seek, the wholesale copying of servers containing user data, requires Megaupload, as the ISP, to engage in a very complex, burdensome, and expensive eDiscovery exercise involving both the forensic review of the data and the involvement of technical and legal experts to assess everything from what is discoverable to how it could be provided while remaining compliant with applicable privacy laws such as the Federal Stored Communications Act ("SCA").
>
> Given that the Cogent servers had a caching aspect to them other rules, copyright safe harbors (such as the DMCA caching safe harbor), and user privacy protections related to transient data or communications may be implicated and need to be analyzed on how it impacts eDiscovery.

We need to meet and confer with you on such eDiscovery matters and we don't have enough time to do that prior to the Stay deadline.

In our prior efforts in 2012 to get access to Megaupload servers and data to preserve and analyze (and possibly return some data to users), including a meet and confer in front of Judge Anderson, the DOJ and Motion Picture Studios opposed it with a theoretical parade of horribles such as using the materials to infringe.

We proposed at the time access by Megaupload's counsel and eDiscovery experts only for preservation, analysis, and use in defense of the related cases - the DOJ and MPAA failed to agree with even a hyper conservative approach to data handling. If Megaupload could have had access to the server data at that time we may be in a different position today. We were left with the impression that any efforts by Megaupload to get access to its server data and user generated materials from Cogent or Carpathia was futile. We had an understanding that both Cogent and Carpathia were preserving the server data.

Without access to such Megaupload server data and analysis of such data engaging in civil eDiscovery meet and confer was impractical.

* * *

It is fair to acknowledge up front that it is statistically likely that a robust amount of the server data, derived from publicly accessible materials, would be discoverable and not subject to SCA protections. On the other hand it is also statistically likely that private and other non discoverable materials exist on such servers from user privileged data to confidential and sensitive data. Therefore without our eDiscovery and legal team's server data analysis we cannot lump all the protected and non protected data together and stipulate prior to a fair review and meet and confer process that plaintiffs can grab in a wholesale manner Megaupload's servers without the diligent data parsing applicable law mandates.

The Stored Communications Act, 18 U.S.C. § 2701 et seq., (the "SCA") regulates when an electronic communication service ("ECS") provider may provide or assist in providing the contents of or other information related to user electronic communications to private parties. Congress passed the SCA to prohibit a provider of an electronic communication service "from knowingly divulging the contents of any communication while in electronic storage by that service to any person other then the addressee or intended recipient." S.Rep. No. 99-541, 97th Cong. 2nd Sess. 37, reprinted in 1986 U.S.C.C.A.N. 3555, 3591.

As courts have held, the SCA "protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility." *Theofel v. Farey-Jones*, 341 F.3d 978, 982 (9th Cir. 2003). It "reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility." *Id*. at 982.

Under 18 U.S.C. § 2701, an offense is committed by anyone who: "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;" or "(2) intentionally exceeds an authorization to access that facility; and thereby obtains ... [an] electronic communication while it is in electronic storage in such system." 18 U.S.C. § 2701(a)(1)-(2).

Disclosure of contents is strictly regulated. The SCA provides that any "person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service," with limited exceptions. 18 U.S.C. § 2702(a)(1).

Contents of communications may not be disclosed to civil litigants even when presented with a civil subpoena. *O'Grady v. Superior Court*, 139 Cal.App.4th 1423, 1448 (Cal.App. 2006); *accord* The U.S. Internet Service Provider Association, Electronic Evidence Compliance—A Guide for Internet Service Providers, 18 BERKELEY TECH. L. J. 945, 965 (2003) ([No Stored Communications Act provision] "permits disclosure pursuant to a civil discovery order unless the order is obtained by a government entity. ... [T]he federal prohibition against divulging email contents remains stark, and there is no obvious exception for a civil discovery order on behalf of a private party."); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp.2d 606 (E.D.Va. 2008) ("Agreeing with the reasoning in *O'Grady*, this Court holds that State Farm's subpoena may not be enforced consistent with the plain language of the Privacy Act because the exceptions enumerated in § 2702(b) do not include civil discovery subpoenas."); *J.T. Shannon Lumber Co., Inc. v. Gilco Lumber Inc*., 2008 WL 4755370 (N.D.Miss. 2008) (holding there is no "exception to the [SCA] for civil discovery or allow for coercion of defendants to allow such disclosure."); *Viacom Intern. Inc. v. Youtube Inc*., 253 F.R.D. 256 (S.D.N.Y. 2008) ("ECPA § 2702 contains no exception for disclosure of [the content of] communications pursuant to civil discovery requests."); *Thayer v. Chiczewski*, 2009 WL 2957317 (N.D. Ill. 2009) ("most courts have concluded that third parties cannot be compelled to disclose electronic communications pursuant to a civil--as opposed to criminal--discovery subpoena"); *Crispin v. Christian Audigier, Inc*., 717 F. Supp. 2d 965 (C.D. Cal. 2010); *Mintz v. Mark Bartelstein & Associates, Inc*., 885 F. Supp. 2d 987, 991 (C.D. Cal. 2012) ("The SCA does not contain an exception for civil discovery subpoenas.").

The quickly evolving eDiscovery rules require the parties to meet and confer to avoid disputes. Such eDiscovery rules provide numerous shields against using eDiscovery as a weapon to harass or to raise costs. There a number of new rules related to reducing the burdens of eDiscovery for example - cooperation of counsel on eDiscovery, proportionality of demands, and the requirement of an early meet and confer conference as a condition of the commencement of eDiscovery. None of the above have been met here.

> Plaintiffs' approach has the optics of using such sudden eDiscovery "demand" burdens as a sword against severely weakened litigants - the very thing Judge O'Grady's Stay order was designed to protect against. As you know Megaupload's assets, in a civil forfeiture action brought by the US, have been forfeited under US law. While the civil forfeiture judgment is currently on appeal there is an appearance of gamesmanship in plaintiffs suddenly imposing artificial and asymmetrical discovery burdens on a litigant as a condition of stay when plaintiffs know Megaupload and the others have no access to US funds.
>
> In an effort to cooperate, given Megaupload's limited resources available, we ask that your respective clients stipulate to the extension of the Stay. Megaupload, without any waiver of procedural and merits challenges to everything in the Actions as a whole, will agree to meet and confer with you and the DOJ on eDiscovery matters to see if a stipulation can be reached.
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> As part of the meet and confer we will need to discern, with DOJ and your clients' stipulation, if Megaupload, as the ISP, can get access to its own user data from Cogent so it could preserve it and engage in the proper legal and technical analysis mandated by applicable law - including for example the SCA. The DOJ will need to be consulted on such matters given their historic opposition to Megaupload getting even attorneys' eyes only access to such materials.
>
> We hope you understand that given the totality of the circumstances, such as the current lack of resources, the DOJ's and MPAA's prior server data objections, and the mandates of the SCA, Megaupload is in essence required to respond in this manner.
>
> Please advise if your respective clients agree to Stay in light of the above. If you disagree with any of the above please advise right away.
>
> Megaupload reserves all rights….

(**Exhibit A**, Mar. 25, 2016 2:54 PM email).Plaintiffs declined to proceed as Defendants had proposed.

9. The parties then held an extended meet-and-confer telephone call, but were unable to resolve this issue. On the call Plaintiffs acknowledged that Cogent had agreed, and continues to agree, to preserve the cached data of Megaupload's users, but Plaintiffs contended that they "would prefer" that the cached data also be in their hands.

10. Defendants' counsel advised that, given the potential complexities under the ECPA and the SCA, the only party who is permitted to control the data is the ISP—namely

Megaupload—because "any" third party transfer is strictly prohibited. *See In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp.2d 606 (E.D. Va. 2008) ("Agreeing with the reasoning in *O'Grady*, this Court holds that State Farm's subpoena may not be enforced consistent with the plain language of the Privacy Act because the exceptions enumerated in § 2702(b) do not include civil discovery subpoenas."). The insoluble problems with Plaintiffs' demand are that they immediately want a mirrored copy of Megaupload's users' data that had been cached on the servers leased from Cogent, without any statutory authorization or protective order, without Megaupload's counsel first being permitted to review the data, and without even providing a copy to Megaupload's counsel.

11. After the meet-and-confer call, Megaupload's counsel spoke with Cogent's general counsel and learned that Cogent has continued to preserve the cached data, and will continue to do so. However, if any party should be allowed to obtain an additional copy this data, it should be Megaupload, not Plaintiffs.

12. In the interests of judicial economy, Defendants incorporate by reference and rely upon the briefs they filed earlier in this action to show the prejudice that they would suffer were the Court to lift the stay generally (Dkt. Nos. 21 & 30). In addition, even partially lifting the stay to permit this discovery will burden Defendants because they have no unrestrained assets with which to pay civil litigation counsel and electronic discovery vendors in the United States (**Exhibit A**, Mar. 25, 2016 2:54 PM email). Moreover, there appears to be no urgency spurring Plaintiffs' request, nor any need to act immediately to preserve evidence.

13. At the outset of this litigation, Plaintiffs consented to a stay subject only to their demand that they be allowed (i) to serve process, (ii) to amend their pleading, and (iii) to seek

asset-seizure orders (Dkt. No. 26). Over Defendants' objections, the Court granted that relief (Dkt. No. 31). Plaintiffs sought no relief from the consent-stay to conduct discovery.

14. Furthermore, by Rule, civil discovery is barred until certain other events have transpired—none of which has occurred in this action. *See* FED.R.CIV.P. 26(d)(1) ("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."). Courts generally find that expedited discovery is available only "when some unusual circumstances or conditions exist that would likely prejudice the party if they were required to wait the normal time." *Physicians Interactive v. Lathian Sys. Inc.*, No. 1:03cv1193, 2003 U.S. Dist. LEXIS 22868, at *11-12 (E.D. Va. Dec. 5, 2003) (internal quotation marks omitted); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995) (denying motion for expedited discovery). Plaintiffs have neither made a motion nor proffered any reasons for pursuing extensive, expensive, and intrusive third-party discovery at this time—and so far as Defendants can discern, there are no grounds to do so. Indeed the Plaintiffs only stated concern is to "preserve" the data, but that is not an issue because Cogent has preserved and will continue to preserve the data.

15. Moreover, Plaintiffs are not now permitted access to this data pursuant to a subpoena to "preserve" it or for other purposes. *See, e.g. Viacom Intern. Inc. v. Youtube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008) ("ECPA § 2702 contains no exception for disclosure of [the content of] communications pursuant to civil discovery requests."). In any event, as the ISP who is lawfully permitted to possess this data under ECPA and the SCA, Megaupload will endeavor to obtain and preserve a redundant copy from Cogent. Once the stay is lifted in this action and discovery commences, and should a proper review of the data reveal that disclosure will not violate SCA or any other statute, Plaintiffs' access to the users' data (subject to a protective

order) might be pursued. At this juncture, however, caution and prudence dictate that the Court preclude Plaintiffs from subpoenaing this data from Cogent.

16. Therefore, the Court should extend the stay as Defendants request and without the conditions sought by Plaintiffs, because the Megauplaod user data is being preserved by Cogent. However, if Plaintiffs make a motion to lift the stay and seek leave to serve a subpoena on Cogent, Defendants will oppose that motion for the reasons argued above.

WHEREFORE, Megaupload respectfully requests that the Court enter the attached proposed order extending the stay.

Dated: March 31, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2016, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users:

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