

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ADOBE SYSTEMS, INC.,)	CIVIL ACTION NO. 3:01CV00009
and ALIAS/WAVEFRONT, INC.,)	
a division of SILICON GRAPHICS)	
LIMITED,)	
)	
Plaintiffs,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
FADI AJINE)	
a/k/a MOHAMED MOOTY,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

The plaintiffs, Adobe Systems, Inc. and Alias/Wavefront, Inc., allege that defendant Fadi Ajine, an individual residing in Charlottesville, Virginia, is illegally copying their software products and auctioning the pirated copies on the Internet. The plaintiffs filed this case under seal, did not serve a summons on Ajine, and requested an immediate *ex parte* hearing. For this reason, Ajine is unaware he has been sued. The plaintiffs seek a “seizure order,” by which they want the court to send the U.S. Marshals to Ajine’s home to seize and impound any evidence of piracy. They also seek a preliminary injunction and an order for expedited discovery. Because the plaintiffs have not shown why these motions should be granted *ex parte*, without giving Ajine notice of these proceedings or even notice that he has been sued, the motions shall be denied.

I.

In November 2000, Michael Flynn, an employee at a non-profit association that works with the plaintiffs to combat software piracy, observed that copies of the plaintiffs’

software were being offered for sale at forty-two different auctions on the Internet. To catch Ajine red-handed, the plaintiffs orchestrated a type of “sting” operation prior to filing suit. Flynn sent an e-mail to the address associated with the seller, “creativityforever@hotmail.com,” to see if any more auctions would be held. Although the name associated with that e-mail address was “Cynthia McNamera,” Flynn believes Ajine was the one who actually used that address. “McNamera” responded that an auction was unnecessary, and offered to sell the plaintiffs’ software products for the same price they sold for at auction. Flynn wrote back, asking to buy specific products normally valued at \$20,000. “McNamera” replied that “she” would sell them for \$125, and told Flynn to send the payment to Ajine at a particular address in Charlottesville.

Flynn did so. On December 8, 2000, he received several CD-ROMs containing copies of the plaintiffs’ software. The CD-ROMs had handwritten installation instructions and bore no indicia of copyright. The package contained none of the artwork or inserts that typically accompany the plaintiffs’ products. Flynn believes Ajine sold him unlicensed software, and has done so to others.

The plaintiffs filed a complaint against Ajine on January 29, 2001. With the complaint, the plaintiffs filed a motion to seal the case, which the court granted. The plaintiffs also immediately requested an *ex parte* hearing, which took place on February 9, 2001. The plaintiffs sought three orders at the *ex parte* hearing: (1) a preliminary injunction, to prohibit Ajine from selling unauthorized copies of the plaintiffs’ copyrighted software products and from destroying evidence of infringement; (2) a seizure order, for seizure and impoundment of any illegally made copies of the software, printouts of the

plaintiff's computer directories, copies of Ajine's invoices pertaining to illegal sales, and any other tangible evidence of copyright infringement; and (3) an order for expedited discovery.

It appears that this type of *ex parte* seizure / preliminary injunction request is Adobe's *modus operandi*. Adobe made identical *ex parte* requests in *Adobe Systems, Inc. v. South Sun Products, Inc.*, 187 F.R.D. 636, 640 (S.D. Cal. 1999). In that case, the court carefully explained that Adobe's *ex parte* requests were not proper absent a showing that the defendant had destroyed evidence or willfully violated court orders in the past. The court denied Adobe's motions in their entirety. This court finds the *Adobe Systems* case persuasive, and for the reasons discussed below, reaches the same conclusion.

II.

A.

The plaintiffs first move for a preliminary injunction. In *Consolidation Coal Co. v. Disabled Miners of Southern West Virginia*, 442 F.2d 1261 (4th Cir. 1971), the Fourth Circuit examined the issuance of an *ex parte* preliminary injunction issued without notice. The court determined that "[t]his was manifestly error, because Rule 65(a)(1) is explicit that '[n]o preliminary injunction shall be issued without notice.'" *Id.* at 1269 (quoting Fed. R. Civ. P. 65(a)(1)). Therefore, the plaintiffs' *ex parte* motion for a preliminary injunction must be denied.

Assuming the plaintiffs intended to move for a temporary restraining order (TRO), the following four factors must be balanced: (1) the likelihood of irreparable harm to the plaintiff if the TRO is not granted; (2) the likelihood of harm to the defendant if the TRO

is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. See *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977); see also *James A. Merritt & Sons v. Marsh*, 791 F.2d 328 (4th Cir. 1986) (applying *Blackwelder* test to temporary restraining order).

The plaintiffs primarily argue that they have established a prima facie case of infringement, which raises a presumption of likely success on the merits and of irreparable harm. They also assert that the harm to the defendant is minimal, because any profits he would make from selling pirated software would be ill-gotten, and that the public interest favors restraining illegal acts. Therefore, they claim the *Blackwelder* balance tips in their favor.

However, there is a threshold requirement the plaintiffs must meet before the court proceeds to balancing the above factors. In the Southern District of California action, Adobe and its co-plaintiffs also “vigorously argue[d] that they have established a likelihood of success on the merits of their copyright infringement claim and are entitled to a presumption of irreparable injury.” *Adobe Sys.*, 187 F.R.D. at 638. As the court in that case found, “the court cannot reach this argument until it addresses the threshold question that arises anytime a party seeks a restraining order *ex parte*: have Plaintiffs presented an adequate justification for failing to give notice to the Defendant?” *Id.*

Rule 65(b) authorizes the court to issue a temporary restraining order without written or oral notice to the adverse party, but only if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse

party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Fed. R. Civ. P. 65(b).

Ex parte injunctive relief under Rule 65(b) "is generally confined to two situations. First, a plaintiff may obtain *ex parte* relief by showing that it is impossible to give notice to the adverse party because the plaintiff does not know the party's identity or location." *Adobe Sys.*, 187 F.R.D. at 639. The plaintiffs do not contend it was impossible to serve Ajine, nor could they, as Flynn's affidavit identifies Ajine's address in Charlottesville. (See Flynn Aff. ¶ 5.)

"The second and remaining way a plaintiff may obtain an *ex parte* restraining order is by showing that proceeding *ex parte* is the 'sole method of preserving a state of affairs in which the court can provide effective final relief.'" *Adobe Sys.*, 187 F.R.D. at 639 (quoting *Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 4 (2d Cir. 1979) (per curiam)). The plaintiffs cannot show that proceeding *ex parte* is the sole method of preserving the state of affairs in which the court can provide effective final relief, for several reasons.

First, simply asserting that Ajine has the opportunity to destroy evidence is insufficient:

[T]o justify proceeding *ex parte*, [the plaintiffs] must do more than assert that the adverse party would dispose of evidence if given notice . . . [the p]laintiffs must show that [the] defendant[] would have disregarded a direct court order and disposed of the goods within the time it would take for a hearing.

The applicant must support such assertions by showing that the adverse party has a history of disposing of evidence or

violating court orders or that persons similar to the adverse party have such a history.

First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 651 (6th Cir. 1998). The plaintiffs claim that individuals in Ajine's situation are likely to destroy evidence. In support, the plaintiffs proffer the affidavit of Julian Kish, a defendant in a similar case pending in the Northern District of Illinois. Kish testified that he previously sold unlicensed software, and that, when he received a cease and desist letter, he deleted the contents of his hard drive to destroy any evidence of his piracy. Although Kish's affidavit incriminates Kish, it is but a slender reed for supporting *ex parte* proceedings against Ajine. The plaintiffs have no evidence that Ajine is connected in any business or personal capacity with Kish, and the plaintiffs have no evidence that Ajine has a history of disposing of evidence or of violating court orders. Therefore, the court finds the plaintiffs' evidence insufficient to warrant proceeding *ex parte* in the case of Ajine.

Second, the plaintiffs already have substantial evidence that Ajine infringed their copyrights, even if Ajine attempts to destroy all the evidence in his possession. The plaintiffs have the evidence described in Flynn's affidavit, know who supplied Ajine with the allegedly pirated copies of their software, and are aware of forty-two auction sites at which Ajine allegedly sold unlicensed software. The plaintiffs made no showing that they cannot obtain evidence to support their case from those auction sites, through normal discovery processes.

Third, "[e]ven if an infringer managed to delete every file associated with Plaintiffs' software, Plaintiffs could still recover many of those files since the operating

system does not actually erase the files, but merely marks the space consumed by the files as free for use by other files.” *Adobe Sys.*, 187 F.R.D. at 642. The plaintiffs concede this is so under the “traditional” method of deletion, but submitted affidavits at the hearing indicating that advanced software is available that permits a computer user to destroy files beyond retrieval. Even if such technology exists, the plaintiffs presented no evidence that Ajine has a propensity to destroy evidence by traditional, let alone “non- traditional,” means.

Accordingly, the plaintiffs’ Rule 65(b) application is deficient on its face because the plaintiffs have not shown that proceeding *ex parte* is the “sole method of preserving a state of affairs in which the court can provide effective final relief.” *Adobe Sys.*, 187 F.R.D. at 643. The plaintiffs have not shown Ajine is likely to destroy evidence, and they already have substantial evidence of infringement. If infringement is shown, Ajine will be permanently enjoined from infringing further, and will be subject to contempt if he violates the injunction. The plaintiffs’ concerns about ongoing infringement may be addressed by filing a fully-noticed motion for a preliminary injunction under Rule 65(a).

B.

The plaintiffs also move for a seizure order. Essentially the plaintiffs assert that if Ajine finds out about this lawsuit, he has a strong incentive to destroy any evidence of his piracy, including any pirated copies of the plaintiffs’ products. The plaintiffs claim the court has the authority to order such a seizure under: the Copyright Act, 17 U.S.C. § 503; the All Writs Act, 28 U.S.C. § 1651(a); and Rule 65(b).

Although the Copyright Act permits a court to impound “all copies claimed to have

been made or used in violation of the copyright owner's exclusive rights," 17 U.S.C. § 503, the plaintiffs' *ex parte* request "is properly sought under Federal Rule 65(b) rather than under Section 503(a) of the Copyright Act," *Adobe Sys.*, 187 F.R.D. at 639 n.2 (citing cases), because Rule 65(b) specifically addresses the *ex parte* context of their request. ¹

The same principle applies to the All Writs Act. Although that Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the Act "does not authorize [federal courts] to issue *ad hoc* writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Where, as here, there is a statutory procedure which "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* Since Rule 65(b) expressly addresses *ex parte* situations, its standards govern the plaintiffs' motions. ²

¹ The plaintiffs cite several cases for the proposition that the Copyright Act authorizes *ex parte* seizure orders. See *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1361 (E.D. Va. 1995); *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 210 (E.D.N.Y. 1994); *Dae Han Video Prod., Inc. v. San*, 1990 WL 265976 (E.D. Va. 1990); *WPOW, Inc. v. MRLJ Enters.*, 584 F. Supp. 132, 135 (D.D.C. 1984). These cases are distinguishable, because none concerned an *ex parte* situation. Although some mentioned they previously had issued such orders, they did not discuss their rationale for doing so.

² The plaintiffs only cite *In re Grand Jury Proceedings*, 626 F.2d 1051, 1058 (1st Cir. 1980), for the proposition that the All Writs Act can be invoked to preserve evidence. That case is distinguishable because it did not arise in an *ex parte* situation.

As far as Federal Rule of Civil Procedure 65(b) is concerned, the court already has indicated that the plaintiffs did not meet their threshold burden of showing that proceeding *ex parte* is the “sole method of preserving a state of affairs in which the court can provide effective final relief.” *Adobe Sys.*, 187 F.R.D. at 643.

Therefore, neither the Copyright Act, the All Writs Act, nor Rule 65 supports the plaintiffs’ request for an *ex parte* seizure order. The court also is strongly disinclined to order such a seizure because Ajine is an individual. The plaintiffs’ argument that this fact weighs in favor of seizure is not well-taken. The bedrock proposition that “a man’s home is his castle,” dates “[a]s far back as *Semayne’s Case* of 1604.” *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring). Absent a strong showing that has not been made here, the court shall not disturb this proposition by deploying the U.S. Marshals in a civil action to the home of a man who has no notice he has been sued and no opportunity to be heard, to ransack his personal effects and seize whatever they or the plaintiffs’ counsel deem to be evidence of copyright infringement.

C.

The plaintiffs also move for expedited discovery because Ajine’s alleged conduct “demonstrates a need for swift action.” The plaintiffs having failed to show why any motion should be granted *ex parte*, this motion also shall be denied.

III.

In sum, the court finds that the plaintiffs have not demonstrated that proceeding *ex parte* is appropriate. Accordingly, the plaintiffs’ motions shall be denied in their entirety, and this case shall be unsealed.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

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)	<u>ORDER</u>
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FADI AJINE)	
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Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the plaintiffs' *ex parte* "Application for an Order to Preserve Evidence and Motion for Preliminary Injunction," and "Motion for Expedited Discovery," all filed January 29, 2001. The court convened an *ex parte* hearing at which plaintiffs' counsel presented oral argument. Having considered the arguments and evidence presented, the applicable law, and the documented record, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The plaintiffs' *ex parte* "Application for an Order to Preserve Evidence," filed January 29, 2001, shall be, and it hereby is, DENIED;
2. The plaintiffs' *ex parte* "Motion for Preliminary Injunction," filed January 29, 2001, shall be, and it hereby is, DENIED;
3. The plaintiffs' *ex parte* "Motion for Expedited Discovery," filed January 29,

2001, shall be, and it hereby is, DENIED;

4. This case shall be, and it hereby is, UNSEALED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date