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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

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11 MALIBU MEDIA, LLC, a California  
limited liability company,

12 Plaintiff,

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14 v.

15 JOHN DOES 1 through 10,

16 Defendants.

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Case Nos. CV 12-3614 RGK (SSx)  
CV 12-3615 RGK (SSx)  
CV 12-3620 RGK (SSx)  
CV 12-3622 RGK (SSx)  
CV 12-4649 RGK (SSx)  
CV 12-4651 RGK (SSx)  
CV 12-4652 RGK (SSx)  
CV 12-4653 RGK (SSx)  
CV 12-4656 RGK (SSx)  
CV 12-4660 RGK (SSx)  
CV 12-4661 RGK (SSx)  
CV 12-4662 RGK (SSx)  
CV 12-650 RGK (SSx)

**PLAINTIFF’S REPLY IN SUPPORT  
OF MOTION FOR LEAVE TO  
SERVE THIRD PARTY  
SUBPOENAS PRIOR TO A RULE  
26(f) CONFERENCE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: September 17, 2012  
Time: 9:00 a.m.  
Place: Ctrm 850 (Roybal)

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The issue in Plaintiff’s motion is simple: does good cause exist to allow Plaintiff to serve discovery prior to a Rule 26(f) conference? As discussed below and as found by nearly every court throughout the country, including this Court, the answer is “yes.” Rather than address the substance of Plaintiff’s motion,<sup>1</sup> Defendants filed an opposition brief that attacks Plaintiff based on a fantastical account of Plaintiff’s litigation strategy. Though represented by counsel, Defendants contend that “abusive litigation tactics” and “coercive settlements” are at risk, however, Defendants have not cited to a single instance in which they were subjected to abusive litigation tactics by counsel. As one court noted, Defendants’ argument about abusive litigation tactics is simply without any merit in cases such as this where Defendants are represented by counsel. *Malibu Media, LLC v. John Does 1-9*, Case No. 8:12-cv-669-SDM-AEP, Docket no. 25 at p. 7 (M.D.Fla. July 6, 2012).

Defendants are attempting to influence this Court to make a decision based on accusations in other cases involving other counsel and other plaintiffs. Indeed, Defendants cite to cases that can only refer to vague, anecdotal accusations of improper settlement tactics. These erroneous conclusions are propagated by anti-copyright blogs as a suggested defense strategy. While Defendants go to substantial effort to decry Plaintiff’s purpose and settlement attempts, Defendants have not and cannot provide one specific example of Plaintiff improperly holding a defendant to

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<sup>1</sup> Defendants do not substantively address Plaintiff’s joinder arguments, and instead, in a blatant attempt to circumvent this Court’s 20-page limit for opposition briefs, refers the Court to an 18-page motion to sever that Defendants filed concurrently with their opposition briefs. Defendants’ motion to sever should not be considered herewith.

1 account. *See Patrick Collins, Inc. v. Does 1-54*, 2012 WL 911432, at \*4 (D.Ariz.  
2 Mar.19, 2012) (“The likelihood that [Defendants] will be subject to such tactics is  
3 minimal here; the Court will not conclude based on the tactics of other lawsuits in  
4 other districts that this suit was brought for a purely improper purpose.” *Patrick*  
5 *Collins, Inc.*, 2012 WL 911432; *see also, Third Degree Films v. Does 1-36*, 2012  
6 WL 2522151 (E.D.Mich. May 29, 2012) (denying a Doe defendant’s motion to  
7 quash and stating: “while Defendant claims that this suit was brought only to scare  
8 up settlements [Citation], Defendant has offered no case-specific facts supporting  
9 this claim. Rather, Defendant relies on the conduct of adult-film companies in other  
10 cases. This guilt-by-association argument does not justify quashing the subpoena  
11 that this Plaintiff, Third Degree Films, served on Defendant’s ISP....”).

12 Defendants essentially argue that Plaintiff’s business model is designed so  
13 that Plaintiff may initiate litigation against multiple John Doe Defendants, obtain  
14 early requested discovery from the ISPs to identify the ISP customers, and then  
15 present the ISP customers with a situation akin to a “Sophie’s choice” – namely, to  
16 settle with Plaintiff for a nominal amount or be named as a defendant in this case  
17 and face damage to their reputation associated with defending this case. Essentially,  
18 Defendants are requesting the Court create a special exception under the Copyright  
19 Act for cases such as this in which the copyrighted material contains pornography.  
20 *See Malibu Media, LLC v. John Does 1-9*, Case No. 8:12-cv-00669-SDM-AEP.  
21 Docket No. 25 at p. 7 (M.D.Fla. July 6, 2012). Indeed, it is highly unlikely that  
22 Defendants’ concerns “would be as heightened and given as much attention by other  
23 courts if the alleged protected material was copyrighted music rather than  
24 pornography.” *Id.* at n.3; *see also, Patrick Collins, Inc. v. Does 1-54*, 2012 WL  
25 911432, at \*4 (D.Ariz. Mar.19, 2012) (“Although the Court acknowledges that there  
26 is some social stigma attached to consuming pornography, Defendant strenuously  
27 denies the allegations, and it is the rare civil lawsuit in which a defendant is not

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1 accused of behavior of which others may disapprove. The nature of the allegations  
2 alone do not merit a protective order.”).

3 But the fact that pornographic material is at issue in this suit should have no  
4 bearing on the Court’s decision. Indeed, bias against Plaintiff for the work that it  
5 produces does not belong in a federal courthouse, particularly in light of the Fifth  
6 Circuit’s oft-cited decision in *Mitchell Bros. Film Group v. Cinema Adult Theater*,  
7 604 F.2d 852 (5<sup>th</sup> Cir. 1979), which held that the copyright statute contains no  
8 explicit or implicit bar to copyrighting obscene materials and provides for a  
9 copyright of all creative works, obscene or non-obscene, that otherwise meet the  
10 requirements of the Copyright Act. *See also, Jartech, Inc. v. Clancy*, 666 F.2d 403,  
11 406 (9<sup>th</sup> Cir. 1982) (“Acceptance of an obscenity defense [to copyright laws] would  
12 fragment copyright enforcement, protecting registered materials in a certain  
13 community, while, in effect, authorizing pirating in another locale.”).

14 Finally, to address Defendants’ criticism of Plaintiff’s attempt to settle its  
15 disputes with the doe defendants prior to naming and serving them with process,  
16 such settlement demands are routinely made prior to the filing of a lawsuit. This is  
17 in line with the well-established public policy favoring resolution through  
18 settlements. *Marek v. Chesny*, 473 U.S. 1, 11 (1985) (“Rule 68’s policy of  
19 encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it  
20 expresses a clear policy of favoring settlement of all lawsuits.”). Furthermore,  
21 Plaintiff has a First Amendment right under the petition clause to make a settlement  
22 demand. *Sosa v. DirectTV*, 437 F. 3d 923, 937 (9th Cir. 2006) (holding “the  
23 protections of the Petition Clause extend to settlement demands as a class,”  
24 including those made during and prior to a suit.). The only difference between this  
25 case and the countless others filed every day by other plaintiffs in a broad array of  
26 civil litigation is that Plaintiff does not have the ability to identify the Doe  
27 defendants before the suit is filed.

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1 The fact that Plaintiff has brought so many suits is not an indication that  
2 Plaintiff is misusing the legal process; rather, it is indicative of the rampant  
3 infringement occurring throughout the country. Plaintiff’s motivation for bringing  
4 these suits is simple: to hold infringers like Defendants herein liable for their  
5 outright and continued theft. Indeed, the online theft of Plaintiff’s property greatly  
6 damages its business, products, and reputation, and this mass online infringement is  
7 pervasive in the adult movie industry. According to a Miami New Times survey,  
8 thirty two percent (32%) of respondents admit to illegally downloading their adult  
9 movies.<sup>2</sup> Plaintiff’s motivation for bringing these suits is to hold the infringers liable  
10 for their theft and, by so doing, to deter the future theft of its movies. If there were  
11 an easier way to stop the infringement, Plaintiff would immediately pursue it.

12 As established in Plaintiff’s motion and below, good cause exists for Plaintiff  
13 to issue Rule 45 subpoenas prior to a Rule 26(f) conference in these related cases,  
14 and Plaintiff respectfully requests that the Court grant Plaintiff the opportunity to  
15 discover the identities of the Doe defendants and proceed with these cases.

16 **II. GOOD CAUSE EXISTS FOR EARLY DISCOVERY**

17 Plaintiff established in its opening brief that good cause exists for the  
18 requested early discovery. “In Internet infringement cases, courts routinely find  
19 good cause exists to issue a Rule 45 subpoena to discover a Doe defendant’s  
20 identity, prior to a Rule 26(f) conference, where a plaintiff makes: (1) a prima facie  
21 showing of infringement, (2) there is no other way to identify the Doe Defendant,  
22 and (3) there is a risk an ISP will destroy its logs prior to the conference.” *UMG*  
23 *Recording, Inc. v. Doe*, 2008 WL 4104214 at \*4 (N.D.Cal. 2008). In addition, some  
24 courts also analyze a defendant’s First Amendment right to privacy in determining

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26 <sup>2</sup> See <http://business.avn.com/articles/video/Miami-New-Times-Releases-Sex-Survey-Results-447237.html>  
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1 whether to allow the discovery. In these cases, courts require Plaintiff to (4) specify  
2 the discovery requested, (5) demonstrate a central need for the subpoenaed  
3 information to advance the asserted claims, and (6) establish that the party's  
4 expectation of privacy does not outweigh the need for the requested discovery. *Sony*  
5 *Music Entm't v. Does 1-40*, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004).

6 In this case, Plaintiff satisfied the above-listed factors. *First*, in its Complaints,  
7 Plaintiff asserts that it holds valid copyrights. Complaint, ¶ 11 and Ex. B. Further,  
8 the signed declaration of Tobias Fieser states that Plaintiff's research indicated that  
9 the works have been infringed upon and that he was able to isolate the transactions  
10 and the IP addresses being used on the peer-to-peer network to reproduce, distribute,  
11 display, or perform Plaintiff's copyrighted works. *Second*, Plaintiff established that it  
12 lacks any other means of obtaining the subpoenaed information. Plaintiff only has the  
13 IP addresses and cannot locate any further information. Rather, once the IP addresses,  
14 plus the date and time of the detected and documented infringing activity are  
15 provided to the ISP, the ISPs can access the identifying information of the subscriber.  
16 Plaintiff has taken all of the steps it can to identify the Doe defendants. *Third*,  
17 Plaintiff demonstrated through the declaration of Tobias Fieser that "[m]any ISPs  
18 only retain the information sufficient to correlate an IP address to a person at a given  
19 time for a very limited amount of time." [Docket no. 4-1, ¶ 11.] Thus, there is a  
20 chance that the ISPs will destroy the logs needed by Plaintiff. *Fourth*, Plaintiff has  
21 sufficiently described the John Doe Defendants by listing the IP address assigned to  
22 them on the day Plaintiff alleges the Defendants engaged in the infringing conduct in  
23 a chart attached as Exhibit A to the Complaint. *Fifth*, Plaintiff has demonstrated the  
24 need for the subpoenaed information in order to advance its claims as there appears  
25 no other means of obtaining this information and the information is needed in order  
26 to prosecute Plaintiff's viable claim for copyright infringement. *Sixth*, and finally,  
27 Plaintiff's interest in knowing Defendants' true identities outweighs Defendants'

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1 interests in remaining anonymous. Plaintiff has a strong legitimate interest in  
2 protecting its copyrights and it has been held that copyright infringers have no  
3 legitimate expectation of privacy in the subscriber information they provide to ISPs.  
4 *Doe v. S.E.C.*, 2011 WL 4593181 at \*3 (N.D.Cal. Oct. 4, 2011) (“Internet subscribers  
5 do not have a reasonable expectation of privacy in subscriber information they have  
6 already conveyed to their [Internet Service Providers].”); *see also, Guest v. Leis*, 255  
7 F.3d 325, 226 (6<sup>th</sup> Cir. 2001) (holding that “computer users do not have a legitimate  
8 expectation of privacy in their subscriber information because they have conveyed it  
9 to another person – the system operator”); *U.S. v. Hambrick*, Civ. No. 99-4793, 2000  
10 WL 1062039 at \*4 (4<sup>th</sup> Cir. Aug. 3, 2000) (a person does not have a privacy interest  
11 in the account information given to the ISP in order to establish an email account);  
12 *Achte/Neinte Boll Kino Beteiligungs GmbH & Co. v. Does 1-4*, 577, 736 F.Supp.2d  
13 212, 215 (D.D.C. 2010) (same); *U.S. v. Kennedy*, 81 F.Supp.2d 1103, 1110 (D.Kan.  
14 2000) (defendant’s right to privacy was not violated when an ISP turned over his  
15 subscriber information because there is no expectation of privacy in information  
16 provided to third parties).

17 **III. THE REQUESTED DISCOVERY SEEKS RELEVANT**  
18 **INFORMATION**

19 Defendants contends that early discovery should not be allowed because the  
20 identification of the IP address holder will not necessarily identify the purported  
21 copyright infringer. Though unlikely, that may be the case. Nonetheless, the  
22 information sought is still relevant and discoverable. Indeed, Rule 26 of the Federal  
23 Rules of Civil Procedure defines the scope of discovery as including “any  
24 nonprivileged matter that is relevant to any party’s claim or defense – including the  
25 existence, description, nature, custody, condition, and location of any documents or  
26 other tangible things *and the identity of the location or persons who know of any*  
27 *discoverable matter.*” Fed. R. Civ. P. 26(b)(1) (emphasis added). Relevant

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1 information for discovery purposes includes any information “reasonably calculated  
2 to lead to the discovery of admissible evidence.” *Id.*

3 The Eastern District of Pennsylvania court recently discussed whether an IP  
4 address was sufficient to identify the infringer:

5 The Court acknowledges that Verizon's compliance with the subpoena  
6 may not directly reveal the identity of an infringer. Indeed, the  
7 subscriber information Verizon discloses will only reveal the account  
8 holder's information, and it may be that a third party used that  
9 subscriber's IP address to commit the infringement alleged in this case.

9 *Raw Films, Ltd v. John Does 1-15*, 2012 WL 1019067 (E.D.Pa. March 26, 2012)  
10 (internal citations omitted). The Court went on to note that while the IP address did  
11 not guarantee the subscriber was the infringer, “[t]he subpoena is specific enough to  
12 give rise to a reasonable likelihood that information facilitating service upon proper  
13 defendants will be disclosed if the ISPs comply.” *Id.*

14 Defendant relies heavily on Judge Brown’s opinion in *In re BitTorrent Adult*  
15 *Film Copyright Infringement Cases*, 2012 WL 1570765 (E.D.N.Y. June 12, 2012),  
16 in the Eastern District of New York, where Judge Brown questioned the likelihood  
17 that the infringer was the owner of the IP address.<sup>3</sup> Plaintiff respectfully disagrees  
18 with Judge Brown’s opinion, particularly in light of the fact that recent  
19 technological advances make it more likely that a wireless account will be secured  
20 and can easily be traced to a household where the subscriber either is the infringer or

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21 <sup>3</sup> Defendant’s numerous references in his/her Motion to the May 1, 2012 decision by  
22 Judge Gary R. Brown of the Eastern District of New York, *In re Bittorrent Adult*  
23 *Film Copyright Infringement Cases*, 2012 WL 1570765 (E.D.N.Y. June 12, 2012),  
24 is unpersuasive. Indeed, just one month after Judge Brown issued his opinion  
25 therein, Judge E. Thomas Boyle of the same court in the Eastern District of New  
26 York, reached the opposite result in *Malibu Media, LLC v. John Does 1-13*, 2012  
27 WL 2325588 (E.D.N.Y. June 19, 2012) (“*Malibu Media*”), finding in a case similar  
28 to this that joinder is proper, and denying a Doe defendant’s motion to quash the  
subpoena. Significantly, Judge Brown’s decision in *In re Bittorrent* was decided *ex*  
*parte* and without a hearing whereas Judge Boyle’s decision in *Malibu Media* was  
made following an hour-long hearing with counsel for Plaintiff.



1 knows the infringer. Recently, PC Magazine published an article regarding the  
2 scarcity of open wireless signals, stating: “These days, you are lucky to find one in  
3 100 Wi-Fi connections that are not protected by passwords of some sort.”<sup>4</sup> The  
4 author explains why routers are now more likely to be secured: “The reason for the  
5 change is simple: the router manufacturers decided to make users employ security  
6 with the set-up software. As people upgrade to newer, faster routers, the wide-open  
7 WiFi golden era came to an end.” This article, published on March 26, 2012, runs  
8 contrary to Judge Brown’s assertions and supports the idea that most households do  
9 have closed, protected wireless that are not likely to be used by a neighbor or  
10 interloper.

11 Furthermore, Plaintiff uses the same process as Federal Law Enforcement to  
12 identify cyber crimes. In a Statement of Deputy Assistant Attorney General Jason  
13 Weinstein before the Senate Judiciary on Privacy, Technology and the Law, he  
14 discusses how Federal law enforcement use IP addresses to identify an individual.

15 When a criminal uses a computer to commit crimes, law enforcement  
16 may be able, through lawful legal process, to identify the computer or  
17 subscriber account based on its IP address. This information is  
18 essential to identifying offenders, locating fugitives, thwarting cyber  
19 intrusions, protecting children from sexual exploitation and  
20 neutralizing terrorist threats.<sup>5</sup>

21 The information sought by Plaintiff falls squarely within the broad scope of  
22 discovery and is therefore warranted in this matter. The identity of the IP address  
23 holder is relevant under Rule 26, in that it is “reasonably calculated” to lead to the  
24 identity of the infringer, whether it is the IP address holder or some other individual.  
25 Thus, any concern about identifying a potentially innocent ISP customer, who

26 <sup>4</sup> See *Free Wi-Fi is Gone Forever*, [www.pcmag.com/article2/0,2817,2402137,00.asp](http://www.pcmag.com/article2/0,2817,2402137,00.asp)

27 <sup>5</sup> Statement of Deputy Assistant Attorney General Jason Weinstein Before the Senate Judiciary  
28 Subcommittee on Privacy, Technology and the Law available at [www.justice.gov](http://www.justice.gov).

1 happens to fall within the Plaintiff’s discovery requests upon the ISPs, is minimal  
 2 and not an issue that should warrant the Court to minimize or even prohibit the  
 3 otherwise legitimate, relevant, and probative discovery.

4 **IV. PLAINTIFF HAS EVERY INTENTION OF LITIGATING THIS CASE**

5 Defendants erroneously suggest that Plaintiff has no intention of actually  
 6 litigating the case and that “no defendant has ever been served in one of these mass  
 7 copyright cases.” Motion, p.9. Defendant is wrong. Plaintiff has sued numerous  
 8 individual defendants for copyright infringement in courts throughout the country,  
 9 and has every intention of litigating these cases as well.<sup>6</sup>

10 **III. DEFENDANTS DO NOT HAVE AN EXPECTATION OF PRIVACY**

11 Judge Howell of the District Court for the District of Columbia recently  
 12 denied a motion filed by Defendants’ counsel – Morgan Pietz – containing virtually  
 13 identical arguments, and held that the putative Doe defendants did not have a First  
 14 Amendment right to proceed anonymously in the action: “The use of anonymity as a  
 15 shield from copyright liability is not a motivation that warrants protection from the  
 16 Court. To the extent that the putative defendant has a First Amendment interest at  
 17 stake, that interest is small. *The First Amendment does not protect copyright*

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 20 <sup>6</sup> See, e.g., *Malibu Media LLC v. Southgate*, 3:12-cv-00369-DMS-WMC (S.D.Cal.);  
 21 *Malibu Media, LLC v. Abrahamzadez*, 1:12-cv-01200-ESH (D.D.C.); *Malibu Media*  
 22 *LLC v. Bochnak*, 1:12-cv-07030 (N.D.Ill.); *Malibu Media LLC v. Siembida*, 1:12-cv-  
 23 07031 (N.D.Ill.); *Malibu Media LLC v. Vancamp*, 2:12-cv-13887-PDB-DRG  
 24 (E.D.Mich.); *Malibu Media LLC v. Fantalis*, 1:12-cv-00886-MEH (D.Colo.);  
 25 *Malibu Media LLC v. Xu*, 1:12-cv-1866-MSK-MEH (D.Colo.); *Malibu Media LLC*  
 26 *v. Allison*, 1:12-cv-1867-MSK-MEH (D.Colo.); *Malibu Media LLC v. Ramsey*,  
 27 1:12-cv-1868-MSK-MEH (D.Colo.); *Malibu Media LLC v. Tipton*, 1:12-cv-1869-  
 28 MSK-MEH (D.Colo.); *Malibu Media LLC v. Kahrs*, 1:12-cv-1870-MSK-MEH  
 (D.Colo.); *Malibu Media LLC v. Domindo*, 1:12-cv-1871-MSK-MEH (D.Colo.);  
*Malibu Media LLC v. Peng*, 1:12-cv-1872-MSK-MEH (D.Colo.); *Malibu Media*  
*LLC v. Maness*, 1:12-cv-1873-MSK-MEH (D.Colo.); *Malibu Media LLC v. Nelson*,  
 1:12-cv-1875-MSK-MEH (D.Colo.); *Malibu Media LLC v. Geary*, 1:12-cv-1876-  
 MSK-MEH (D.Colo.); *Malibu Media LLC v. Detweiler*, 2:12-cv-4253-ER  
 (E.D.Pa.); *Malibu Media LLC v. Johnston*, 2:12-cv-4200-JHS (E.D.Pa.).

