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

MALIBU MEDIA, LLC, a California Corporation,

Plaintiff,

vs.

JOHN DOES 1 through 48,

Defendants.

No. 2:12-cv-01255 JAM DAD

ORDER AND FINDINGS AND RECOMMENDATIONS

_____ /
This matter came before the undersigned on June 15, 2012 for hearing of plaintiff's ex parte application and motion for leave to take expedited discovery. Greg Fayard, Esq. appeared on behalf of plaintiff Malibu Media, LLC.

In this action plaintiff alleges that Doe defendants 1 through 48 infringed on its copyright with respect to 16 pornographic motion pictures, the graphic titles of which are identified in plaintiff's complaint. Specifically, plaintiff alleges that in the course of monitoring Internet-based infringement of its copyrighted content, its agents observed unlawful reproduction and distribution of the subject motion pictures by the 48 Doe defendants via the Bit Torrent file transfer protocol. Although plaintiff does not know the names of the Doe defendants, its agents created a log identifying the Doe defendants by their IP addresses and the dates and times of their alleged unlawful activity. The IP addresses, internet service providers ("ISPs"), and dates and

1 times of the alleged unlawful activity by the 48 Doe defendants are identified in an exhibit to
2 plaintiff's complaint.

3 As noted above, plaintiff has filed an ex parte application for expedited discovery
4 to serve Rule 45 subpoenas on the ISPs to obtain the names, addresses, telephone numbers, e-
5 mail addresses and Media Access Control ("MAC") address of the 48 Doe defendants. With
6 respect to the requested expedited discovery as to Doe 1, the court finds plaintiff has shown good
7 cause to conduct expedited discovery and the request will be granted.¹ With respect to the
8 remaining Doe defendants, however, it appears that plaintiff's joinder of unrelated defendants is
9 improper under Federal Rule of Civil Procedure 20. Given the technical complexities of
10 BitTorrent swarm functions,² it appears unlikely that the 48 Doe defendants engaged in any

12 ¹ Plaintiff, however, does not address the relevance of the MAC address or how it will
13 aid plaintiff in discovering the identity of any Doe defendant. Moreover, because plaintiff will be
14 provided with the name, address and email address of Doe 1, the court finds that there is not
15 good cause at this time to authorize plaintiff to obtain the telephone number of Doe 1.
16 Accordingly, the court finds that plaintiff has not shown good cause for an order authorizing the
17 production of the MAC addresses or telephone number of any Doe defendant and plaintiff's
18 request for an order authorizing it to subpoena the MAC addresses or telephone number of any
19 Doe defendant will therefore be denied without prejudice.

20 ² The BitTorrent protocol has been summarized as follows:

21 In the BitTorrent vernacular, individual downloaders/distributors
22 of a particular file are called "peers." The group of peers involved
23 in downloading/distributing a particular file is called a "swarm." A
24 server which stores a list of peers in a swarm is called a "tracker."
25 A computer program that implements the BitTorrent protocol is
26 called a BitTorrent "client."

21 The BitTorrent protocol operates as follows. First, a user locates a
22 small "torrent" file. This file contains information about the files
23 to be shared and about the tracker, the computer that coordinates
24 the file distribution. Second, the user loads the torrent file into a
25 BitTorrent client, which automatically attempts to connect to the
26 tracker listed in the torrent file. Third, the tracker responds with a
list of peers and the BitTorrent client connects to those peers to
begin downloading data from and distributing data to the other
peers in the swarm. When the download is complete, the
BitTorrent client continues distributing data to the peers in the
swarm until the user manually disconnects from the swarm or the

1 coordinated effort or concerted activity. See, e.g., Boy Racer, Inc. v. Does 1-60, No. C 11-01738
2 SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) (“Because Doe defendants 2-60 were
3 improperly joined in the matter, the Court is authorized under Rule 21 to ‘drop’ these
4 defendants.”) Under these circumstances, permissive joinder under Federal Rule of Civil
5 Procedure 20(a)(2) is not warranted.³ See Third Degree Films, Inc. v. Does 1-131, 280 F.R.D.
6 493, 495- 500 (D. Ariz. 2012) (Surveying the various approaches to such cases and discovery

7
8 BitTorrent client otherwise does the same.

9 Diabolic Video Prods., Inc. v. Does 1-2099, No. 10-cv-5865-PSG, 2011 WL 3100404 at *1-2
(N.D. Cal. May 31, 2011).

10 ³ The court has additional concerns regarding plaintiff’s request for expedited discovery.
11 A great number of similar cases have been filed in the past several months in this and other
12 District Courts, many of which appear to be simply using the federal courts as an avenue to
13 collect money. As one judge aptly observed:

14 The Court is familiar with lawsuits like this one. [Citations
15 omitted.] These lawsuits run a common theme: plaintiff owns a
16 copyright to a pornographic movie; plaintiff sues numerous John
17 Does in a single action for using BitTorrent to pirate the movie;
18 plaintiff subpoenas the ISPs to obtain the identities of these Does;
19 if successful, plaintiff will send out demand letters to the Does;
20 because of embarrassment, many Does will send back a
21 nuisance-value check to the plaintiff. The cost to the plaintiff: a
22 single filing fee, a bit of discovery, and stamps. The rewards:
23 potentially hundreds of thousands of dollars. Rarely do these cases
24 reach the merits.

25 The federal courts are not cogs in a plaintiff’s copyright-
26 enforcement business model. The Court will not idly watch what
is essentially an extortion scheme, for a case that plaintiff has no
intention of bringing to trial. By requiring Malibu to file separate
lawsuits for each of the Doe Defendants, Malibu will have to
expend additional resources to obtain a nuisance-value settlement –
making this type of litigation less profitable. If Malibu desires to
vindicate its copyright rights, it must do it the old-fashioned way
and earn it.

27 Malibu Media, LLC v. John Does 1 through 10, No. 2:12-cv-3623-ODW (PJWx), 2012 U.S.
28 Dist. LEXIS 89286 at *8-9 (C.D. Cal. June 27, 2012). See also Malibu Media, LLC v. Does 1-5,
29 No. 12 Civ. 2950(JPO), 2012 WL 2001968 at *1 (S.D. N.Y. June 1, 2012) (“This court shares
30 the growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the adult
31 films industry, to shake down the owners of specific IP addresses from which copyrighted adult
32 films were allegedly downloaded.”).

1 requests taken by district courts around the country, determining that the joinder question should
2 be addressed sua sponte at the outset of the litigation and ultimately dismissing Does 2 through
3 131 without prejudice and granting the requested expedited discovery only with respect to Doe
4 defendant 1.) Accordingly, the court will authorize expedited discovery only as to Doe 1 and
5 recommend that the remaining Doe defendants be dismissed without prejudice pursuant to
6 Federal Rule of Civil Procedure 21.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Plaintiff's ex parte application and motion for leave to take expedited
9 discovery (Doc. No. 9) is granted in part;
10 2. Plaintiff may immediately serve a Rule 45 subpoena on the ISP Comcast Cable
11 to obtain the following information regarding the subscriber (defendant John Doe 1)
12 corresponding to the IP address 24.2.55.54: *name, address, and e-mail address*. The subpoena
13 shall have a copy of this order attached.

14 3. The ISP, in turn, shall serve a copy of the subpoena and a copy of this order
15 upon its relevant subscriber within 30 days from the date of service upon it. The ISP may serve
16 the subscriber using any reasonable means, including written notice sent to the subscriber's last
17 known address, transmitted either by first-class mail or via overnight service, or by e-mail notice.

18 4. The subscriber and the ISP shall each have 30 days from the respective dates of
19 service upon them to file any motions contesting the subpoena (including a motion to quash or
20 modify the subpoena).⁴ If that period elapses without the filing of a contesting motion, the ISP
21

22 ⁴ The subscriber may also, if appropriate, elect to file a motion requesting leave to
23 proceed in this action anonymously. See Does I Thru XXII v. Advanced Textile Corp., 214 F.3d
24 1058, 1067-68 (9th Cir. 2000) (holding that in "the unusual case" a party "may preserve his or
25 her anonymity in judicial proceedings in special circumstances when the party's need for
26 anonymity outweighs prejudice to the opposing party and the public's interest in knowing the
party's identity."); see also Digital Sin, Inc. v. Does 1-5698, No. C 11-04397 LB, 2011 WL
5362068, at *4-5 (N.D. Cal. Nov. 4, 2011). Any such motion, however, would be separate and
apart from any motion by the subscriber or the ISP contesting the subpoena itself by seeking to
quash or modify it.

1 shall have fourteen (14) days thereafter to produce the information responsive to the subpoena to
2 plaintiff.

3 5. The subpoenaed ISP shall preserve any subpoenaed information pending the
4 production of the information to plaintiff and/or the resolution of any timely-filed motion
5 contesting the subpoena.

6 6. The ISP that receives a subpoena pursuant to this order shall confer with
7 plaintiff before assessing any charge in advance of providing the information requested in the
8 subpoena.

9 7. Any information disclosed to plaintiff in response to a Rule 45 subpoena may
10 not be used for any improper purpose and may only be used for protecting plaintiff's rights as set
11 forth in the Complaint.

12 8. Plaintiff's request for an order authorizing plaintiff to subpoena the Media
13 Access Control address of any Doe defendant is denied without prejudice.

14 9. Plaintiff's request for an order authorizing plaintiff to subpoena the telephone
15 number of any Doe defendant is denied without prejudice.

16 In addition, IT IS HEREBY RECOMMENDED that Does 2-48 be dismissed
17 without prejudice.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
20 fourteen days after being served with these findings and recommendations, any party may file
21 written objections with the court and serve a copy on all parties. Such a document should be
22 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the
23 objections shall be served and filed within seven days after service of the objections. The parties

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1 are advised that failure to file objections within the specified time may waive the right to appeal
2 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: October 11, 2012.

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7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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