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

MALIBU MEDIA, LLC, a California
corporation,

Plaintiff,

No. 2:12-cv-1261 JAM DAD

vs.

JOHN DOES 1 through 12,
Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

In this action plaintiff alleges that Doe defendants 1 through 12 infringed on its copyright with respect to 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 12 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 IP addresses and the dates and times of their alleged unlawful activity. The IP addresses, internet service providers ("ISPs"), and dates and times of the alleged unlawful activity by the 12 Doe defendants are identified in an exhibit to plaintiff's complaint.

1 On May 14, 2012, plaintiff filed an ex parte application for expedited discovery to
2 serve Rule 45 subpoenas on the ISPs to obtain the names, addresses, telephone numbers, e-mail
3 addresses and Media Access Control (“MAC”) addresses of the Doe defendants. (Doc. No. 7.)
4 On July 11, 2012, the Magistrate Judge previously assigned to this civil action issued an order
5 granting plaintiff’s request for expedited discovery only as to Doe No. 1, and denying the
6 requests as to Does No. 2 through 12 without prejudice. (Doc. No. 8.) On September 4, 2012,
7 Doe No. 1 filed a motion to quash and the motion was set for hearing before the previously
8 assigned Magistrate Judge on October 17, 2012. (Doc. Nos. 10 & 15.)

9 On October 3, 2012, however, a related case order was issued relating ten civil
10 actions filed by plaintiff in 2012 in both divisions of this court, all of which named only Doe
11 defendants and involved plaintiff moving for expedited discovery. (Doc. No. 16.) As a result of
12 that order, all of those actions including this one were reassigned to the undersigned Magistrate
13 Judge and to District Judge John A. Mendez. Accordingly, the October 17, 2012 hearing set
14 before the previously assigned Magistrate Judge of the motion to quash filed by Doe. No. 1 was
15 vacated. (Doc. No. 17.)

16 “[A] district court has the inherent power to revisit its non-final orders, and that
17 power is not lost when the case is assigned mid-stream to a second judge.” Dreith v. Nu Image,
18 Inc., 648 F.3d 779, 787-88 (9th Cir. 2011). See also Perry v. Brown, 667 F.3d 1078, 1086 (9th
19 Cir. 2012) (“As a case progresses and circumstances change, a court may sometimes properly
20 revise a prior exercise of its discretion, whether the new order is made by the same judge or
21 another.”); City of L.A. v. Santa Monica BayKeeper, 254 F.3d 882, 888 (9th Cir. 2001) (district
22 court is vested with the “power to reconsider its own interlocutory order provided that the district
23 court has not been divested of jurisdiction over the order.”); Fairbank v. Wunderman Cato
24 Johnson, 212 F.3d 528, 532-33 (9th Cir. 2000) (“[T]he District Court in its discretion may revisit
25 prior interlocutory decisions entered by another judge in the same case if there are cogent reasons
26 or exceptional circumstances.”); United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986) (“All

1 rulings of a trial court are subject to revision at any time before the entry of judgment.”).

2 “Generally stated, reconsideration is appropriate where . . . it is necessary to correct clear error or

3 prevent manifest injustice.” Cachil Dehe Band of Wintun Indians Cmty. v. California, 649 F.

4 Supp.2d 1063, 1069 (E.D. Cal. 2009) (citing Sch. Dist. No. 1J Multnomah Cnty., Oregon v. AC

5 & S Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)). See also Christianson v. Colt Indus. Operating

6 Corp., 486 U.S. 800, 817 (1988); Arizona v. California, 460 U.S. 605, 618 n. 8 (1983).

7 Here, the court has determined that reconsideration of the July 11, 2012 order is

8 appropriate in order to prevent manifest injustice. In this regard, it appears clear to this court that

9 plaintiff’s joinder of 12 unrelated defendants is improper under Federal Rule of Civil Procedure

10 20. Given the technical complexities of BitTorrent swarm functions,¹ it appears unlikely that the

11 12 Doe defendants engaged in any coordinated effort or concerted activity. See, e.g., Boy Racer,

12 Inc. v. Does 1-60, No. C 11-01738 SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011)

13 (“Because Doe defendants 2-60 were improperly joined in the matter, the Court is authorized

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15 ¹ The BitTorrent protocol has been summarized as follows:

16 In the BitTorrent vernacular, individual downloaders/distributors

17 of a particular file are called “peers.” The group of peers involved

18 in downloading/distributing a particular file is called a “swarm.” A

server which stores a list of peers in a swarm is called a “tracker.”

A computer program that implements the BitTorrent protocol is

called a BitTorrent “client.”

19 The BitTorrent protocol operates as follows. First, a user locates a

20 small “torrent” file. This file contains information about the files

21 to be shared and about the tracker, the computer that coordinates

22 the file distribution. Second, the user loads the torrent file into a

23 BitTorrent client, which automatically attempts to connect to the

24 tracker listed in the torrent file. Third, the tracker responds with a

25 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

BitTorrent client otherwise does the same.

26 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).

1 under Rule 21 to ‘drop’ these defendants.”). Under these circumstances, permissive joinder
2 under Federal Rule of Civil Procedure 20(a)(2) is not warranted.² See Third Degree Films, Inc.
3 v. Does 1-131, 280 F.R.D. 493, 495-500 (D. Ariz. 2012) (Surveying the various approaches to
4 such cases and discovery requests taken by district courts around the country, determining that
5 the joinder question should be addressed sua sponte at the outset of the litigation and ultimately
6 dismissing Does 2 through 131 without prejudice and granting the requested expedited discovery
7 only with respect to Doe defendant 1.) Accordingly, the court will recommend that Does 2
8 through 12 be dismissed without prejudice under Federal Rule of Civil Procedure 21.

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10 ² 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:

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

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

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

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The hearing on the September 4, 2012 motion to quash filed by Doe No. 1 is
3 set for **Friday, November 30, 2012, at 10:00 a.m.**, in Courtroom No. 27, before the
4 undersigned.³

5 2. Any party may appear at the hearing telephonically. To arrange telephonic
6 appearance, the party must contact Pete Buzo, courtroom deputy to the undersigned, at (916)
7 930-4128 not later than 48 hours before the hearing. A land line telephone number must be
8 provided for the court's use in placing a call to the party appearing telephonically.

9 In addition, IT IS HEREBY RECOMMENDED that Does 2-12 be dismissed from
10 this action without prejudice.

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

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22 ³ Doe No. 1 is advised that he or she may also, if appropriate, elect to file a motion
23 requesting leave to proceed in this action anonymously. See Does I Thru XXII v. Advanced
24 Textile Corp., 214 F.3d 1058, 1067-68 (9th Cir. 2000) (holding that in "the unusual case" a party
25 "may preserve his or her anonymity in judicial proceedings in special circumstances when the
26 party's need for 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 the September 4, 2012 motion to quash.

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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