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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 MALIBU MEDIA, LLC, a California
limited liability company,

12 Plaintiff,

13 v.
14

JOHN DOES 1 through 59,

15 Defendants.
16

Case No. 1:12-cv-00888-AWI-DLB

PLAINTIFF'S *EX PARTE*
APPLICATION FOR LEAVE TO
SERVE THIRD PARTY
SUBPOENAS PRIOR TO A RULE
26(f) CONFERENCE

1 Pursuant to Fed. R. Civ. P. 26(d)(1), Plaintiff Malibu Media, LLC
2 (“Plaintiff”), moves the Court *ex parte* for entry of an order granting it leave to serve
3 third party subpoenas prior to a Rule 26(f) conference (the “Application”), and
4 submits the following memorandum in support.

5 **I. INTRODUCTION**

6 Plaintiff seeks leave to serve limited, immediate discovery on the Doe
7 Defendants’ Internet Service Providers (“ISPs”) so that Plaintiff may learn
8 Defendants’ true identities. Plaintiff is suing each of the Defendants for using the
9 Internet and the BitTorrent protocol to commit direct and contributory copyright
10 infringement.

11 Since Defendants used the Internet to commit their infringement, Plaintiff
12 only knows Defendants by their Internet Protocol (“IP”) addresses. Defendants’ IP
13 addresses were assigned to the Defendants by their respective Internet Service
14 Providers (“ISPs”). Accordingly, the ISPs can use the IP addresses to identify the
15 Defendants. Indeed, ISPs maintain internal logs which record the date, time and
16 customer identity for each IP address assignment made by that ISP. Significantly,
17 the ISPs may maintain these logs for only a short period of time.

18 Plaintiff seeks leave of Court to serve a Rule 45 subpoena on the ISPs and any
19 related intermediary ISPs. Any such subpoena will demand the true name, address,
20 telephone number, e-mail address and Media Access Control (“MAC”) address of
21 the Defendant to whom the ISP issued an IP address.¹ Plaintiff will only use this
22 information to prosecute the claims made in its Complaint. Without this
23 information, Plaintiff cannot serve the Defendants nor pursue this lawsuit to protect
24 its valuable copyrights.

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26
27 ¹ A MAC address is a number that identifies the specific computer used for the infringing activity.

1 **II. ARGUMENT**

2 Pursuant to Rule 26(d)(1), except for circumstances not applicable here,
3 absent a court order, a party may not propound discovery in advance of a Rule 26(f)
4 conference. Rule 26(b) provides courts with the authority to issue such an order:
5 “[f]or good cause, the court may order discovery of any matter relevant to the
6 subject matter involved in the action.” “In Internet infringement cases, courts
7 routinely find good cause exists to issue a Rule 45 subpoena to discover a Doe
8 defendant’s identity, prior to a Rule 26(f) conference, where a plaintiff makes: (1) a
9 prima facie showing of infringement, (2) there is no other way to identify the Doe
10 Defendant, and (3) there is a risk an ISP will destroy its logs prior to the
11 conference.” UMG Recording, Inc. v. Doe, 2008 WL 4104214, *4 (N.D. Cal. 2008)
12 (numbers added). See also, Arista Records LLC v. Does 1-19, 551 F. Supp. 2d 1, 6-
13 7 (D.D.C. 2008), and the cases cited therein, noting the “overwhelming” number of
14 cases where copyright infringement plaintiffs sought to identify “Doe” defendants
15 and courts “routinely applied” the good cause standard to permit discovery. Some
16 other courts, in the context of a defendant’s First Amendment right to privacy, also
17 require Plaintiff to: (4) specify the discovery requested, (5) demonstrate a central
18 need for the subpoenaed information to advance the asserted claims, and (6)
19 establish that the party’s expectation of privacy does not outweigh the need for the
20 requested discovery. See Sony Music Entertainment v. Does 1-40, 326 F.Supp. 556,
21 564-565 (S.D.N.Y. 2004). Here, Plaintiff easily satisfies all of these requirements.
22 Accordingly, this Court should grant the Application.

23 **A. Circuit Courts Unanimously Permit Discovery to Identify John**
24 **Doe Defendants**

25 Federal Circuit Courts have unanimously approved the procedure of suing
26 John Doe defendants and then using discovery to identify such defendants. For
27 example, the First Circuit held in Penalbert-Rosa v. Fortuno-Burset, 631 F.3d 592

1 (1st Cir. 2011) that “[a] plaintiff who is unaware of the identity of the person who
2 wronged her can . . . proceed against a ‘John Doe’ . . . when discovery is likely to
3 reveal the identity of the correct defendant.” See also David v. Kelly, 160 F.3d 917,
4 921 (2d Cir. 1998) (“Courts have rejected the dismissal of suits against unnamed
5 defendants . . . until the plaintiff has had some opportunity for discovery to learn the
6 identities.”). Accord Blakeslee v. Clinton County, 336 Fed.Appx. 248, 250 (3d Cir.
7 2009); Chidi Njoku v. Unknown Special Unit Staff; 217 F.3d 840 (4th Cir. 2000);
8 Green v. Doe, 260 Fed.Appx. 717, 719 (5th Cir. 2007); Brown v. Owens Corning
9 Inv. Review Committee, 622 F.3d 564, 572 (6th Cir. 2010); Maclin v. Paulson, 627
10 F.2d 83, 87 (7th Cir. 1980); Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985);
11 Young v. Transportation Deputy Sheriff I, 340 Fed Appx. 368 (9th Cir. 2009);
12 Krueger v. Doe, 162 F.3d 1173, (10th Cir. 1998); Dean v. Barber, 951 F.2d 1210,
13 1215 (11th Cir. 1992).

14 **B. Good Cause Exists to Grant the Application**

15 **1. Plaintiff Properly Pled Copyright Infringement**

16 Plaintiff satisfied the first good cause factor by properly pleading a cause of
17 action for copyright infringement:

18 46. Plaintiff is the owner of the Registration for the Work which
19 contains an original work of authorship.

20 47. By using the BitTorrent protocol and a BitTorrent Client and the
21 processes described above, each Defendant copied the constituent
22 elements of the registered Work that are original.

23 48. Plaintiff did not authorize, permit or consent to Defendants’
24 copying of its Work.

25 Complaint at ¶¶ 46-48. See 17 U.S.C. §106; In re Aimster Copyright Litig., 334
26 F.3d 643, 645 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004) (“Teenagers and
27 young adults who have access to the Internet like to swap computer files containing
28 popular music. If the music is copyrighted, such swapping, which involves making
and transmitting a digital copy of the music, infringes copyright.”). Further,

1 Plaintiff's allegations of infringement are attested to by Plaintiff's investigator, IPP,
2 Limited's employee, Tobias Fieser. See Declaration of Tobias Fieser in Support of
3 Plaintiff's Application for Leave to Take Discovery Prior to a Rule 26(f) Conference
4 ("Fieser Declaration") at ¶¶ 17 and 21, Exhibit A. Accordingly, Plaintiff has
5 exceeded its obligation to plead a prima facie case.

6 **2. There Is No Other Way To Obtain Defendants' True**
7 **Identities**

8 Other than by getting the information from the Defendants' ISPs, there is no
9 other way to obtain Defendants' true identities because "[o]nly the ISP to whom a
10 particular IP address has been assigned for use by its subscribers can correlate the IP
11 address to a real person, the subscriber of the internet service." Fieser Declaration at
12 ¶ 8. Indeed, "[o]nce provided with the IP address, plus the date and time of the
13 detected and documented infringing activity, ISPs can use their subscriber logs to
14 identify the name, address, email address, phone number and Media Access Control
15 number of the subscriber" [i.e., the Defendant]. Fieser Declaration at ¶ 22. Since
16 there is no other way for Plaintiff to obtain Defendants' identities, except by serving
17 a subpoena on Defendants' ISPs demanding it, Plaintiff has established the second
18 good cause factor. See Seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

19 **3. There Is A Risk That An ISP Will Destroy Its Logs Prior To**
20 **The Rule 26(f) Conference**

21 Logically, it is not possible for Plaintiffs to have a 26(f) conference with the
22 Defendants until Plaintiff learns their identities. Therefore, since "[m]any ISPs only
23 retain the information sufficient to correlate an IP address to a person at a given time
24 for a very limited amount of time," see Fieser Declaration at ¶ 10, it is an absolute
25 certainty, unless this Application granted, that the identifying records will be
26 destroyed in advance of the 26(f) conference. Further, unless action is taken
27 quickly, the ISPs' records may be deleted or destroyed and Plaintiff's right to sue
28

1 Defendants for infringement may be forever lost. Since the identifying records will
2 undoubtedly be destroyed before a 26(f) conference, which cannot occur until
3 Plaintiff obtains Defendants' identities from their ISPs, Plaintiff has satisfied the
4 third good cause factor. UMG, 2008 WL 4104214, *5.

5 **4. Plaintiff Has Clearly Identified The Information Sought**
6 **Through Discovery**

7 Plaintiff seeks to discover from the Defendants' ISPs the true name, address,
8 telephone number, e-mail address and Media Access Control ("MAC") address of
9 the Defendants. This is all specific information that is in the possession of the
10 Defendants' ISPs. Since the requested discovery is limited and specific, Plaintiff
11 has satisfied the fourth good cause factor. Sony, 326 F. Supp. At 566.

12 **5. Plaintiff Needs The Subpoenaed Information To Advance**
13 **The Asserted Claims**

14 Obviously, without learning the Defendants' true identities, Plaintiff will not
15 be able to serve the Defendants with process and proceed with this case. Plaintiff's
16 important statutorily protected property rights are at issue in this suit and, therefore,
17 the equities should weigh heavily in favor of preserving Plaintiff's rights. Since
18 identifying the Defendants by name is necessary for Plaintiff to advance the asserted
19 claims, Plaintiff has established the fifth good cause faith factor. Id.

20 **6. Plaintiffs' Interest in Knowing Defendants' True Identities**
21 **Outweighs Defendants' Interests in Remaining Anonymous**

22 Plaintiff has a strong legitimate interest in protecting its copyrights.
23 Defendants are all copyright infringers that have no legitimate expectation of
24 privacy in the subscriber information they provided to the ISPs, much less in
25 distributing the copyrighted work in question without permission. See Interscope
26 Records v. Does 1-14, 558 F.Supp.2d 1176, 1178 (D. Kan. 2008) (a person using the
27 Internet to distribute or download copyrighted music without authorization is not

1 entitled to have their identity protected from disclosure under the First Amendment);
2 Guest v. Leis, 255 F.3d 325, 336 (6th Cir. 2001) (“computer users do not have a
3 legitimate expectation of privacy in their subscriber information because they have
4 conveyed it to another person—the system operator”); and Sony Music
5 Entertainment, Inc. v. Does 1–40, 326 F.Supp.2d 556, 566 (S.D.N.Y. 2004)
6 (“defendants have little expectation of privacy in downloading and distributing
7 copyrighted songs without permission.”) Since Defendants do not have a legitimate
8 interest in remaining anonymous and Plaintiff has a strong, statutorily recognized
9 and protected interest in protecting its copyrights, Plaintiff has established the sixth
10 good cause faith factor.

11 **III. CONCLUSION**

12 For the foregoing reasons, this Court should grant leave to Plaintiff to issue
13 Rule 45 subpoenas to the Defendants’ ISPs.

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15 DATED: May 31, 2012

KUSHNER LAW GROUP

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