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

MALIBU MEDIA, LLC, a California
limited liability company,

Plaintiff,

v.

JOHN DOES 1 through 59,

Defendants.

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

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

1 **THIS CAUSE** came before the Court upon Plaintiff’s *Ex Parte* Application
2 for Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference (the
3 “Motion”), and the Court being duly advised in the premises does hereby:

4 **FIND, ORDER AND ADJUDGE:**

5 1. Plaintiff Malibu Media, LLC, is the registered owner of the copyrights
6 to the motion picture titled “Lunchtime Fantasy.”

7 2. Plaintiff filed a complaint against Doe defendants alleging direct
8 copyright infringement and contributory copyright infringement. Compl. ¶¶ 45-61.

9 3. The Cable Privacy Act generally prohibits cable operators from
10 disclosing personally identifiable information regarding subscribers without either
11 (1) the prior written or electronic consent of the subscriber; or (2) a court order,
12 provided the cable operator provides the subscriber with notice of the disclosure. 47
13 U.S.C. § 551(c)(1),(c)(2)(B). A cable operator is defined as “any person or group
14 of persons (A) who provides cable service over a cable system and directly or
15 through one or more affiliates owns a significant interest in such cable system, or
16 (B) who otherwise controls or is responsible for, through any arrangement, the
17 management and operation of such a cable system.” 47 U.S.C. § 522(5).
18 Accordingly, Plaintiff seeks a court order instructing Charter Communications,
19 Comcast Cable, SBC Internet Services, and SureWest Broadband to produce
20 documents and information sufficient to identify the users of the IP addresses. A
21 chart of the Internet Protocol Addresses and corresponding Internet Service
22 Providers is below:

23

24	1	68.116.88.200	Charter Communications
25	2	68.185.67.16	Charter Communications
26	3	68.189.8.20	Charter Communications
27	4	75.140.112.147	Charter Communications
28	5	174.50.136.126	Comcast Cable

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6	24.10.43.103	Comcast Cable
7	24.10.50.100	Comcast Cable
8	24.10.56.84	Comcast Cable
9	24.10.77.188	Comcast Cable
10	24.23.24.132	Comcast Cable
11	24.23.41.227	Comcast Cable
12	24.23.61.115	Comcast Cable
13	24.7.130.65	Comcast Cable
14	24.7.173.114	Comcast Cable
15	67.181.130.173	Comcast Cable
16	67.181.238.129	Comcast Cable
17	67.182.0.234	Comcast Cable
18	67.187.137.74	Comcast Cable
19	67.187.170.69	Comcast Cable
20	71.195.115.53	Comcast Cable
21	76.105.15.50	Comcast Cable
22	76.105.16.65	Comcast Cable
23	76.105.25.78	Comcast Cable
24	76.20.34.18	Comcast Cable
25	76.20.59.114	Comcast Cable
26	76.20.59.60	Comcast Cable
27	98.192.165.145	Comcast Cable
28	98.208.122.239	Comcast Cable
29	98.224.105.95	Comcast Cable
30	98.224.108.132	Comcast Cable
31	98.224.114.117	Comcast Cable
32	98.224.125.211	Comcast Cable
33	98.224.76.247	Comcast Cable
34	98.224.92.39	Comcast Cable
35	98.238.194.17	Comcast Cable
36	98.238.217.189	Comcast Cable
37	98.239.112.250	Comcast Cable
38	98.242.10.200	Comcast Cable
39	98.242.42.184	Comcast Cable
40	98.242.6.73	Comcast Cable
41	98.242.60.99	Comcast Cable
42	98.255.4.193	Comcast Cable
43	98.255.78.154	Comcast Cable
44	108.195.189.74	SBC Internet Services

45	108.201.86.78	SBC Internet Services
46	108.213.76.52	SBC Internet Services
47	108.226.194.130	SBC Internet Services
48	108.236.152.170	SBC Internet Services
49	108.237.245.187	SBC Internet Services
50	108.83.173.54	SBC Internet Services
51	75.26.21.74	SBC Internet Services
52	75.48.0.13	SBC Internet Services
53	75.53.169.194	SBC Internet Services
54	76.232.111.83	SBC Internet Services
55	76.234.74.102	SBC Internet Services
56	76.234.74.43	SBC Internet Services
57	76.244.83.33	SBC Internet Services
58	99.110.80.190	SBC Internet Services
59	64.113.100.126	SureWest Broadband

4. Consistent with the vast majority of district courts in this Circuit to consider the issue, the undersigned finds that good cause supports permitting plaintiff to conduct limited early discovery in order to discover the identities of the Doe defendants. First, Plaintiff has only named Doe Defendants in this action, has declared through its counsel that the identities of the Doe Defendants are unknown to Plaintiff at this time, and has credibly declared through its counsel that Plaintiff cannot serve the Complaint until it conducts discovery into the identities of the persons associated with the IP addresses in Exhibit A to Plaintiff's counsel's declaration. See Declaration of Leemore Kushner ("Kushner Decl.") at ¶¶ 3-4. Second, Plaintiff plainly cannot conduct a Rule 26(f) conference without knowing the names and contact information of the Doe defendants. Kushner Decl. at ¶ 3. Third, Plaintiff's representations presently support that each IP address is associated with a particular individual and that the discovery sought will facilitate identification of the defendants and service of process. Kushner Decl. at ¶ 4. The Court also finds that the ISPs will not suffer any material prejudice by being served with Rule 45 subpoenas that require the ISPs to provide the names and contact

1 information of some of its customers. Plaintiff's discovery is limited in terms of the
2 type of information sought.

3 5. Courts in the Ninth Circuit have considered four factors derived from
4 Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D.Cal. 1999), in evaluating
5 motions for permission to conduct early discovery in cases such as this one,
6 “whether the plaintiff: (1) identifies the Doe Defendant with sufficient specificity
7 that the court can determine that the defendant is a real person who can be sued in
8 federal court, (2) recounts the steps taken to locate and identify the defendant, (3)
9 demonstrates that the action can withstand a motion to dismiss, and (4) proves that
10 the discovery is likely to lead to identifying information that will permit service of
11 process.” See MCGIP, LLC v. Does 1-49, 2011 WL 3607666 at *2 (citing
12 Columbia Ins. Co., 185 F.R.D. at 578-80).

13 A. Identification of Defendants: Plaintiff provides the Court with the
14 unique IP addresses and names of the ISPs that provided internet access for the users
15 of the identified IP addresses. IPP Limited, Plaintiff’s investigator, allegedly
16 recorded each IP address assigned to the defendants by the ISP, sending it a piece of
17 plaintiff’s copyrighted work in violation of plaintiff’s exclusive distribution right
18 under 17 U.S.C. §106. The requested discovery will provide the true names and
19 addresses of the individuals Plaintiff alleged performed the infringing acts. Plaintiff
20 has alleged and Plaintiff’s counsel has declared that, the ISP has the ability to
21 correlate the IP Address used to commit the infringement to the subscriber of
22 internet service, who Plaintiff alleged committed the infringement. See Kushner
23 Decl. at ¶ 5. The court finds that plaintiff has sufficiently identified each John Doe
24 defendant such that the court can determine that the defendants are real persons or
25 entities who may be sued in federal court.

1 B. Previous Steps Taken to Locate Defendants: Plaintiff has identified the
2 Doe defendants' IP addresses and ISPs. Because the transactions at issue occurred
3 entirely online, the IP addresses and ISPs are the defendants' only available
4 identifying information. Without discovery, there are no other measures Plaintiff
5 can take to identify the Doe defendants or obtain their personal information. The
6 Court therefore finds that Plaintiff has made a good faith effort to comply with the
7 requirements of service of process and specifically identify defendants. See
8 Columbia Ins. Co., 185 F.R.D. at 579.

9 C. The Action can Withstand a Motion to Dismiss: “[A] plaintiff who
10 claims copyright infringement must show: (1) ownership of a valid copyright; and
11 (2) that the defendant violated the copyright owner's exclusive rights under the
12 Copyright Act.” Ellison v. Robertson, 357 F.3d 1072, 1076 (9th
13 Cir.2004) (citing 17 U.S.C. § 501(a) (2003); Ets–Hokin v. Skyy Spirits, Inc., 225
14 F.3d 1068, 1073 (9th Cir.2000)). To prove a claim of direct copyright infringement,
15 “a plaintiff must show that he owns the copyright and that the defendant himself
16 violated one or more of the plaintiff's exclusive rights under the Copyright Act,”
17 whereas “[o]ne who, with knowledge of the infringing activity, induces, causes or
18 materially contributes to the infringing conduct of *another* may be liable as a
19 ‘contributory’ [copyright] infringer. Id. (alteration in original) (citation omitted).
20 The Ninth Circuit has “interpreted the knowledge requirement for contributory
21 copyright infringement to include both those with *actual knowledge* and those
22 who *have reason to know* of direct infringement.” Id. (alteration in original)
23 (citation omitted). Plaintiff alleges that it is the owner, and holds the copyright
24 registration certificate, of a motion picture that Defendants copied and publicly
25 distributed without authorization. Plaintiff alleges that the Defendants knew or
26 should have known that other BitTorrent users in a swarm with it, here the other
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1 Defendants, were directly infringing Plaintiff’s copyrighted Work by copying
2 constituent elements of the registered Work that are original and each Defendant
3 directly participated in and therefore materially contributed to each other
4 Defendant’s infringing activities. Compl. ¶¶ 57-59. Accordingly, Plaintiff has
5 alleged the prima facie elements of both direct and contributory copyright
6 infringement and could withstand a motion to dismiss these claims. See Columbia
7 Ins. Co., 185 F.R.D. at 579–80. In this case, Malibu Media, LLC, has alleged
8 sufficient facts to withstand a motion to dismiss on its claim asserted in this lawsuit.

9 i. Joinder: Consistent with the overwhelming majority of Courts to
10 consider the issue, prior to the identification of the Doe Defendants, this Court finds
11 joinder is proper. This finding is made without prejudice to the Defendant’s ability
12 to raise the issue after the disclosure of the Doe Defendants’ identities. (See Liberty
13 Media Holdings, LLC v. Does 1-62, 2011 WL 1869923 (S.D. Cal. 2011);
14 OpenMind Solutions, Inc. v. Does 1-39, 2011 WL 4715200 (N.D. Cal. 2011)).

15 D. Reasonable Likelihood that Discovery will Lead to Identification: The
16 fourth factor examines whether Plaintiff has demonstrated that there is a reasonable
17 likelihood that the discovery it requests will lead to the identification of Defendants
18 such that it may effect service of process. Columbia Ins. Co., 185 F.R.D. at 580. As
19 indicated above, Plaintiff contends that the key to locating Defendants is through the
20 IP addresses associated with the alleged activity on BitTorrent. Specifically,
21 Plaintiff contends that because ISPs assign a unique IP address to each subscriber
22 and retain subscriber activity records regarding the IP addresses assigned, the
23 information sought in the subpoena will enable Plaintiff to serve Defendants and
24 proceed with this case. Taking this into account, the Court finds that Plaintiff has
25 made a sufficient showing as to this factor.

26 6. For Good Cause shown, It Is Hereby Ordered that:
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1 (A) Plaintiff Malibu Media, LLC, may serve subpoenas, pursuant
2 to Fed.R.Civ.P. 45, on Charter Communications, Comcast Cable, SBC Internet
3 Services, and SureWest Broadband that seek information sufficient to identify the
4 Defendants, including their names, current addresses, telephone numbers and e-mail
5 addresses;

6 (B) Plaintiff Malibu Media, LLC may only use the information disclosed
7 for the sole purpose of protecting its rights in pursuing this litigation;

8 (C) Within thirty (30) calendar days after service of the subpoenas, Charter
9 Communications, Comcast Cable, SBC Internet Services, and SureWest Broadband
10 shall notify the subscribers that their identities are sought by Malibu Media, LLC
11 and shall deliver a copy of this order to them;

12 Charter Communications, Comcast Cable, SBC Internet Services, and
13 SureWest Broadband shall not require plaintiff to pay a fee in advance of providing
14 the subpoenaed information; nor shall Charter Communications, Comcast Cable,
15 SBC Internet Services, and SureWest Broadband require plaintiff to pay a fee for an
16 IP address that is not controlled by it, or for duplicate IP addresses that resolve to
17 the same individual, or for an IP address that does not provide the name of a unique
18 individual, or for their internal costs to notify its customers. If necessary, the Court
19 shall resolve any disputes between Charter Communications, Comcast Cable, SBC
20 Internet Services, and SureWest Broadband and Plaintiff regarding the
21 reasonableness of the amount proposed to be charged by Charter Communications,
22 Comcast Cable, SBC Internet Services, and SureWest Broadband after the
23 subpoenaed information is provided to plaintiff.

24 IT IS SO ORDERED.

25 DATED:

26 _____
UNITED STATES DISTRICT JUDGE