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9 LIBERTY MEDIA HOLDINGS, LLC

10 UNITED STATES DISTRICT COURT

11 SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO DIVISION

12 LIBERTY MEDIA HOLDINGS, LLC)

Case No. 10-CV-1823-DMS-WVG

13 Plaintiff,)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO FOR ORDER GRANTING THIRD
MOTION ALLOWING PLAINTIFF LEAVE
TO TAKE IMMEDIATE DISCOVERY**

14 vs.)

15 DOES 2, 3, DOES 7-9, CARLOS)
16 MANCERA (formerly Doe 10), DOE 13,)
17 JOHN JOHN (formerly Doe 15), DOES 21-)
18 22; DOES 33-35, 37-40; FRED MARTINEZ)
19 (formerly Doe 41); ADELINE AUGUSTIN)
20 (formerly Doe 54))

21 Defendants)

22 Plaintiff Liberty Media Holdings (Liberty) seeks the identities of certain Doe defendants
23 from their respective Internet Service Providers (“ISPs”), and seeks a Court order directing the
24 Road Runner to disclose the subscriber’s personally identifiable information. The relief sought in
25 this motion is no different than that in the Plaintiff’s second motion for early discovery (Doc. 24),
26 which the Court granted in its previous Order (Doc. 25). The Plaintiff has received discovery
27 responses from Cablevision providing the names of the account owners of the IP addresses used by
28 certain Doe defendants to access the Plaintiff’s servers and download the Plaintiff’s copyrighted
works. Plaintiff now must depose the account holders and inspect their computers to determine the
name of the person responsible for the complained of acts. Additionally, the Plaintiff made an

1 error in requesting that the Court instruct Comcast Cable to release subscriber information relating
2 to IP address 76.84.200.40. This IP address is registered to Road Runner, and as such, the Plaintiff
3 respectfully requests that the court amend its order, or in the alternative, issue a new order
4 instructing Road Runner to release the subscriber information found on Exhibit 1 hereto.

5 **INTRODUCTION AND FACTUAL BACKGROUND**

6 1) Plaintiff Liberty is a California LLC doing business as Corbin Fisher ®. Liberty produces,
7 markets, and distributes adult entertainment products, including Internet website content, videos,
8 DVDs, photographs, etc. Plaintiff operates and maintains a website by and through which
9 individuals who pay a monthly subscription fee can view its photographic and audiovisual works.

10 2) On January 25, 2011 the court granted Plaintiff's Second Motion for Early Discovery (ECF
11 No. 25).

12 3) Pursuant to the Order, the Plaintiff issued a subpoena and served it along with the order on
13 various IP addresses including Cablevision requesting information for IP addresses 24.184.108.61
14 and 24.228.21.211, and Comcast requesting information relating to IP address 76.84.200.40.

15 4) Cablevision responded by giving the identities of the following people: John Carbon for the
16 IP address used by Doe 7 and Frances Bran for the IP address used by Doe 22 (as well as a third
17 individual for the IP address used by Doe 24 who subsequently settled with the Plaintiff).

18 5) The Plaintiff now requires discovery from these two individuals in order to determine
19 whether they are the responsible party for the acts complained of, or whether they can identify who
20 the responsible party is (as often times a number of people share the same Internet connection
21 under one person's name).

22 6) Additionally, Comcast responded to the subpoena on February 14, 2011, stating that this IP
23 address used by Doe 21 is registered to Road Runner.

24 7) As such, it is necessary that the court issue a new court order allowing Plaintiff to depose
25 and issue written discovery to John Carbon (aka John Carbone and Frances Bran, as well as
26 instructing Road Runner to provide the information sought about IP address 76.84.200.40 as shown
27 in Exh. 1.

28 8) Defendants Does 21, 22, and 24 are an individuals whose true names and addresses are still
unknown to Plaintiff. These Doe Defendants accessed the Plaintiff's computer servers without

1 authorization, and downloaded and distributed unauthorized and infringing copies of Plaintiff's
2 audiovisual works. Plaintiff was able to record the IP addresses for the individuals, however,
3 Plaintiff can only identify the infringers by way of further investigation.

4 9) The Plaintiff needs the Court's permission to conduct early discovery. Additionally, the
5 information requested in the subpoena to be issued to Road Runner is governed by 47 U.S.C. §
6 551, which prohibits cable operators from disclosing personally identifiable information pertaining
7 to subscribers without the subscriber's express consent unless there is "a court order authorizing
8 such disclosure, if the subscriber is notified of such order by the person to whom the order is
9 directed." 47 U.S.C. § 551(c)(2)(B).

10 10) Accordingly, the Plaintiff requests that the Court issue the requisite Order instructing John
11 Carbon and Frances Bran to comply with the written discovery and deposition notices issued to
12 them in this case and instructing Road Runner to produce any and all documents and/or
13 information sufficient to identify the user or users of the IP address 76.84.200.40 during the
14 corresponding dates and times as shown in Exh. 1.

15 ARGUMENT

16 Federal Rules Allow for Early Discovery

17 11) Federal Rules allow for discovery prior to a Rule 26 conference upon a showing of good
18 cause. See *Semitoil, Inc. v. Tokyo Electronic America, Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal.
19 2002).

20 12) More specifically, courts have recognized that, "[s]ervice of process can pose a special
21 dilemma for plaintiffs in cases like this in which the tortious activity occurred entirely on-line."
22 *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999). Accordingly, courts
23 have developed the following factors to consider when granting motions for expedited discovery to
24 identify anonymous Internet users: (1) whether the plaintiff can identify the missing party with
25 sufficient specificity such that the court can determine that defendant is a real person or entity who
26 could be sued in federal court; (2) all previous steps taken by the plaintiff to identify the Doe
27 defendant; and (3) whether the plaintiff's suit could withstand a motion to dismiss. *Id.* at 578-80.
28 Each of these factors resolves in favor of granting Plaintiff's requested relief.

1 13) First, Plaintiff has sufficiently identified individuals who are real persons Plaintiff could sue
2 in Federal Court. Plaintiff observed and documented infringement of its registered works by the
3 individuals identified as DOES in the Complaint. The requested discovery is necessary for
4 Plaintiff to determine the true name and address of the individuals who performed the infringing
5 acts.

6 14) Second, there are no other practical measures Plaintiff could take to identify the DOE
7 Defendants. Plaintiff is aware of no available information that would identify the infringing users,
8 other than information maintained by their Internet Service Providers. Due to the nature of on-line
9 transactions, Plaintiff has no way of determining Defendants' identities except through a third-
10 party subpoena.

11 15) Third, Plaintiff has asserted a prima facie claim for copyright infringement in its Complaint
12 that can withstand a motion to dismiss. Specifically, Plaintiff has alleged that a) it owns and has
13 registered the copyrights in the works at issue and b) the Defendants made unauthorized
14 reproductions of those works and distributed them without Plaintiff's authorization. These
15 allegations state a claim for copyright infringement and computer hacking. 17 U.S.C. § 106(1)(3),
16 18 U.S.C. § 2701, and 18 U.S.C. § 1030.

17 16) When outlining the above factors, the court in *Columbia* noted that in cases where injured
18 parties are likely to find themselves chasing unidentified tortfeasors from ISP to ISP, the traditional
19 enforcement of strict compliance with service requirements should be tempered by the need to
20 provide injured parties with a forum in which they may seek redress for grievances. *Columbia*, 185
21 F.R.D. at 579. An analysis of the factors clearly demonstrates Plaintiff's legitimate interest in
22 identifying the name and address of the individuals who infringed upon its copyrighted works.

23 Explanation of Specific Requests

24 17) In addition to the three factors discussed above, courts have indicated that a plaintiff
25 requesting early discovery to identify defendants should justify specific requests and explain how
26 such requests "will lead to identifying information about defendant that would make service of
27 process possible. See *Columbia* 185 F.R.D. at 580; *Gillespie v. Civiletti*, 629 F. 2d 637, 642 (9th
28 Cir.1980).

1 18) The infringement and other wrongful acts at issue in this action occurred through online
2 hacking, downloading, and other unlawful access to Plaintiff's computers. In order to these illegal
3 acts, a user must connect to the Internet.

4 19) Individuals gain access to the Internet through an Internet service provider (ISP). When an
5 ISP provides Internet access to a subscriber, it does so through a modem located at the subscriber's
6 home or office. Each time the subscriber accesses the Internet, the ISP provides a unique number
7 to the subscriber called an Internet protocol (IP) address. This is somewhat akin to a telephone
8 number. The IP address for a subscriber may stay the same (a static IP address) or it may change
9 from time to time (a dynamic IP address). ISPs generally record the times and dates it assigns each
10 IP address to a subscriber.

11 20) Online technology used to engage in unlawful online theft relies on the ability to identify
12 the computers to and from which users search and exchange files. The technology identifies those
13 computers through the IP address from which the computer connects to the Internet. In this
14 manner, Plaintiff identified the IP addresses from which individuals connected to the Internet for
15 the purpose of unlawfully accessing Plaintiff's works and making electronic copies thereof.
16 Plaintiff recorded the exact date and time individuals used various IP addresses to access the
17 Internet to make illegally download these files from Plaintiff's servers.

18 21) Anyone can perform a simple search on public databases to determine which Internet access
19 provider controls a specific IP address. Plaintiff now seeks to subpoena the above listed Internet
20 Service Providers to determine the name and address of the subscribers to whom they assigned the
21 various IP addresses recorded.

22 22) Plaintiff requests that the Court amend its previous order or issue a new order allowing
23 Plaintiff to serve a subpoena on Road Runner requesting specific subscriber information necessary
24 to identify Doe 21.

25 23) Since 47 U.S.C. §551 (The Cable Privacy Act) prohibits cable operators from disclosing
26 personally identifiable information concerning subscribers without the prior written or electronic
27 consent of the subscriber or a court order, and since some Internet service providers, including
28 Road Runner, is also a cable operator, Plaintiff requests that the Court order state clearly that the

1 Court contemplated the Cable Privacy Act and that the order specifically complies with the Act's
2 requirements. See, 47 U.S.C. §551.

3 **CONCLUSION**

4 24) The Plaintiff requests that the Court issue a new order

- 5 a. Permitting the Plaintiff to issue written discovery to and depose John Carbon aka
6 John Carbone regarding Doe 7's use of the IP address 24.184.108.61 as this person
7 either is Doe 7 or is likely to have information pertaining to Doe 7's identity,
8 b. Permitting the Plaintiff to issue written discovery to and depose Frances Bran
9 regarding Doe 22's use of the IP address 24.228.21.211 as this person either is Doe
10 22 or is likely to have information pertaining to Doe 22's identity,
11 c. Instructing Road Runner to produce any and all documents and/or information
12 sufficient to identify the user or users of the IP address 76.84.200.40 during the
13 corresponding dates and times as listed in Exh. 1.

14 25) Plaintiff will only use this information to prosecute the claims made in its Complaint.
15 Without this information Plaintiff cannot pursue its lawsuit to protect its copyrighted works.

16 26) Such discovery should be conditioned on a) the ISPs having 7 calendar days after service of
17 the subpoenas to notify the subscriber that their identity is sought by Plaintiff, and b) each
18 subscriber whose identity is sought having 21 calendar days from the date of such notice to file any
19 papers contesting the subpoena.

20 Dated: March 7, 2011

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CERTIFICATE OF SERVICE

The undersigned does certify that the foregoing document was filed using the Court’s CM/ECF system on March 7, 2011. Plaintiff served the named defendants via U.S. Mail. As Plaintiff is unable to identify the remaining Doe Defendants, Plaintiff is unable to serve them.

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