

# **Exhibit D**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
Northern District of California

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

AF HOLDINGS LLC,  
Plaintiff,

v.

DOES 1-96,  
Defendants.

Case No.: C-11-03335 JSC

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S REQUEST  
FOR DISCOVERY PRIOR TO RULE  
26(f) CONFERENCE**

This case is one of several "mass copyright" cases filed in this District on behalf of various plaintiffs against hundreds of doe defendants accused of using BitTorrent technology to illegally download copyrighted files from the internet. See, e.g., Boy Racer v. Does 2-52, Case No. 11-2834-LHK (PSG); Boy Racer v. Does 1-52, Case No. 11-2329-PSG; Pacific Century Int'l, Ltd. v. Does 1-101, Case No. 11-2533-DMR; Pacific Century Int'l, Ltd. v. Does 1-129, Case No. 11-3681-HRL; MCGIP, LLC v. Does 1-149, Case No. 11-2331-LB; Hard Drive Productions, Inc. v. Does 1-166, Case No. 11-03682-LHK (HRL); Hard Drive Productions, Inc. v. Does 1-188, Case No. 11-1566-JCS; Hard Drive Productions, Inc. v. Does 1-118, Case No. 11-01567-LB.

EXHIBIT     D

1 Plaintiff seeks limited discovery ex parte under Federal Rule of Civil Procedure  
2 (“FRCP”) 26(d) and FRCP 45 in order to discover the identities of the ninety-six Doe  
3 Defendants named in this suit. For the reasons explained below, Plaintiff’s application is  
4 DENIED without prejudice.  
5

6 I. Background

7 Plaintiff alleges that the ninety-six (96) Doe Defendants (“Defendants”) used  
8 BitTorrent, an internet peer-to-peer (“P2P”) file sharing network, to illegally reproduce and  
9 distribute Plaintiff’s copyrighted work—“Sexual Obsession”—in violation of the Copyright  
10 Act, 17 U.S.C. § 101 et seq. (Complaint at ¶¶25-31, Dkt. No. 1.) Plaintiff further alleges that  
11 by using the BitTorrent program to download and distribute Plaintiff’s content, each  
12 Defendant likewise committed civil conspiracy. (Id. at ¶¶32-38.) Because Defendants’  
13 conduct occurred behind the mask of their anonymous internet protocol (“IP”) addresses,  
14 Plaintiff cannot identify Defendants without leave to subpoena Defendants’ internet service  
15 providers (“ISPs”) for the identity of the individual or entity related to each IP address.  
16 Plaintiff claims that “[w]hen provided with a Doe Defendant’s IP address and the date and  
17 time of the infringing activity, an ISP can accurately identify the Doe Defendant . . . because  
18 such information is contained in the ISP’s subscriber activity log files.” (Dkt. No. 6 at 3:24-  
19 27.) Consequently, Plaintiff asks the Court to grant expedited discovery to issue subpoenas to  
20 the relevant ISPs to require the ISPs to disclose the name, address, telephone number, and  
21 email address for each Defendant’s IP address.  
22

23 //

24 //

United States District Court  
Northern District of California

1 II. Discussion

2 Under FRCP 26(d)(1), discovery is not permitted without a court order prior to a  
3 conference between the parties as required by FRCP 26(f) and then only upon a showing of  
4 “good cause.” Semitool, Inc. v. Tokyo Electron American, Inc., 208 F.R.D. 273, 275 (N.D.  
5 Cal. 2002). “Good cause may be found where the need for expedited discovery, in  
6 consideration of the administration of justice, outweighs the prejudice to the responding  
7 party.” Id. at 276.  
8  
9

10 When a defendant’s identify is not known at the time a complaint is filed, courts often  
11 grant plaintiffs early discovery to determine the doe defendants’ identities “unless it is clear  
12 that discovery would not uncover the identities, or that the complaint would be dismissed on  
13 other grounds.” Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). In Gillespie, for  
14 example, the Ninth Circuit held that the district court abused its discretion in denying early  
15 discovery because it was “very likely” that the requested early discovery—interrogatories  
16 directed to named defendants—would “have disclosed the identities of the ‘John Doe’  
17 defendants.” Id. at 643; see also Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999)  
18 (quoting Gillespie that “the plaintiff should be given an opportunity through discovery to  
19 identify the unknown defendants, unless it is clear that discovery would not uncover the  
20 identities, or that the complaint would be dismissed on other grounds”); Coreno v. Hiles, 2010  
21 WL 2404395 at \*3 (S.D. Cal. June 14, 2010) (quoting Gillespie and allowing early discovery  
22 because it is “very likely” the requested discovery will uncover the unknown defendants’  
23 identities); Young v. Transportation Deputy Sheriff I, 2009 WL 2011201 at \*1 (9th Cir. July  
24 6, 2009) (finding that “plaintiff should be given the opportunity through discovery to identify  
25  
26  
27  
28

United States District Court  
Northern District of California

1 the unknown defendants, unless it is clear that discovery would not uncover the identities, or  
2 that the complaint would be dismissed on other grounds”).

3 Thus, under Gillespie, the question is whether the early discovery Plaintiff seeks in this  
4 action would be “very likely” to reveal the identities of Defendants.<sup>1</sup> Based on new  
5 information on the success of such early discovery in a similar case, the Court concludes that  
6 the requested discovery is not likely to reveal the identities of the doe defendants. In Boy  
7 Racer, Inc. v. Does 1-52, Case No. 11-2329-PSG (N.D. Cal), another BitTorrent case with  
8 nearly identical facts to the case at hand, the same counsel representing Plaintiff here filed a  
9 request for the same type of early discovery; namely, subpoenas on the ISPs. (Id., Dkt. No.  
10 6.) The court granted the motion in order to allow plaintiff to uncover the identity of  
11 defendant Doe 1 by subpoenaing the relevant ISP for identifying information linked to Doe  
12 No. 1’s IP address. (Id., Dkt. No. 8.) The court subsequently noted that its decision was  
13 based on plaintiff’s representation that “if the court would simply authorize it, the plaintiff can  
14 issue a targeted subpoena to the internet service provider associated with each IP address and  
15 secure the subscriber information associated with each address . . . [and] proceed to name the  
16 defendants in the conventional manner and serve each defendant, so that the case may proceed  
17 to disposition.” (Id., Dkt. No. 17 at 2:8-10.)

18 Despite this early discovery, the plaintiff was not able to learn the identity of Doe No. 1  
19 as anticipated. In fact, the plaintiff later informed the court that “still more discovery was  
20 required” including “an inspection of the subscriber’s electronically stored information and  
21

22  
23  
24  
25  
26  
27  
28 <sup>1</sup> The Court need not and does not reach the next level of the Gillespie inquiry as to whether the  
complaint would be dismissed on other grounds.

United States District Court  
Northern District of California

1 tangible things, including each of the subscriber’s computer and the computers of those  
 2 sharing his internet network.” (Id., Dkt. No. 17 at 3:3-5.) The plaintiff conceded that the  
 3 subscriber identifying information revealed by the ISP discovery “does not tell Plaintiff who  
 4 illegally downloaded Plaintiff’s works, or, therefore, who Plaintiff will name as the Defendant  
 5 in this case. It could be the Subscriber, or another member of his household, of any number of  
 6 other individuals who had direct access to Subscribers network.” (Id., Dkt. No. 14 at 2:17-20.)  
 7  
 8 The plaintiff thus explained that in order to name the doe defendant it would require further  
 9 discovery, including inspection of the identified subscriber’s computer, “and all of those  
 10 computers that subscriber has reasonable control over/access to, for the limited purpose of  
 11 discovering who accessed the BitTorrent protocol, entered a swarm containing a File with  
 12 Plaintiff’s copyrighted video, and unlawfully downloaded it.” (Id. at 2:23-26.) The plaintiff  
 13 would also likely require depositions, interrogatories, and other discovery methods. (Id. at  
 14 3:1-2.) Only after these discovery efforts could the plaintiff effectuate service and identify the  
 15 doe by name. (Id. at 3:3.) Indeed, the plaintiff moved for permission to serve a subpoena on  
 16 the subscriber for a deposition, and if that did not yield sufficient information to name Doe  
 17 No. 1, a second subpoena to inspect the subscriber’s premises. If that subpoena likewise  
 18 failed to reveal sufficient information, the plaintiff sought a third subpoena for production of  
 19 electronically stored information. (Id., Dkt. No. 18.)

24 As the issues here are identical to those in Boy Racer, Plaintiff faces the same hurdles  
 25 as Boy Racer: granting Plaintiff’s motion for early discovery will not give Plaintiff sufficient  
 26 information to name any—let alone all—of the 96 does as a defendant in this case. Such  
 27 discovery is only the first step in Plaintiff’s attempt to identify persons to name and serve as  
 28

1 defendants in this case. Since the requested subpoenas will not, in fact, identify the doe  
2 defendants, Plaintiff's motion for early discovery is DENIED. See Gillespie, 629 F.2d at 642.

3 This denial is without prejudice to Plaintiff making a new motion to seek discovery that  
4 is, in fact, "very likely" to enable Plaintiff to identify the doe defendants. Such motion,  
5 however, would have to demonstrate "good cause" for the discovery sought, including that  
6 Plaintiff's need for the discovery outweighs the prejudice to the respondent in having to  
7 respond to such requests in a case in which Plaintiff claims each doe defendant downloaded a  
8 single copyrighted file which retails on the internet for \$24.99. (Dkt. No. 11-1 at 3.) The  
9 Court notes that at least one other court has declined to find good cause to authorize such  
10 discovery in nearly identical circumstances. Boy Racer v. Does 1-52, Case No. 11-2329-PSG,  
11 Dkt. No. 21.

12 This Order disposes of Docket No. 6.

13 **IT IS SO ORDERED.**

14 Dated: September 27, 2011

15  
16  
17  
18  
19  
20 JACQUELINE SCOTT CORLEY  
21 UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26  
27  
28