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

MALIBU MEDIA, LLC,

Plaintiff,

No. 2:12-cv-1459 GEB CKD

vs.

JOHN DOES 1-7,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

In this action, plaintiff alleges copyright infringement of pornographic motion pictures against Doe defendants. In the course of monitoring Internet-based infringement of its copyrighted content, plaintiff’s agents allegedly observed unlawful reproduction and distribution of the subject motion pictures by the Doe defendants via the Bit Torrent file transfer protocol. Although plaintiff does not know the actual names of the Doe defendants, plaintiff’s agents created a log identifying the Doe defendants by their 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 Doe defendants are identified in an exhibit to plaintiff’s complaint.

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1 Plaintiff has filed an ex parte application for expedited discovery to serve Rule 45  
2 subpoenas on the ISPs to obtain the names, addresses, telephone numbers, and e-mail addresses  
3 of the Doe defendants. With respect to the requested expedited discovery as to Doe 1, the court  
4 finds plaintiff has shown good cause and the request will be granted. With respect to the  
5 remaining Doe defendants, however, it appears that plaintiff's joinder of unrelated defendants is  
6 improper under Federal Rule of Civil Procedure 20. Given the technical complexities of  
7 BitTorrent swarm functions,<sup>1</sup> it appears unlikely that the Doe defendants engaged in any  
8 coordinated effort or concerted activity. See, e.g. Boy Racer, Inc. v. Does 1-60, 2001 WL  
9 3652521 (N.D. Cal. Aug. 19, 2011). Under these circumstances, permissive joinder under  
10 Federal Rule of Civil Procedure 20(a)(2) is not warranted.<sup>2</sup> Accordingly, the court will authorize

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12 <sup>1</sup> The BitTorrent protocol has been summarized as follows:

13 In the BitTorrent vernacular, individual downloaders/distributors  
14 of a particular file are called "peers." The group of peers involved in  
15 downloading/distributing a particular file is called a "swarm." A server  
16 which stores a list of peers in a swarm is called a "tracker." A computer  
17 program that implements the BitTorrent protocol is called a BitTorrent  
18 "client."

19 The BitTorrent protocol operates as follows. First, a user locates a  
20 small "torrent" file. This file contains information about the files to be  
21 shared and about the tracker, the computer that coordinates the file  
22 distribution. Second, the user loads the torrent file into a BitTorrent client,  
23 which automatically attempts to connect to the tracker listed in the torrent  
24 file. Third, the tracker responds with a list of peers and the BitTorrent  
25 client connects to those peers to begin downloading data from and  
26 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.

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).

24 <sup>2</sup> The court has additional concerns regarding plaintiff's request for expedited discovery.  
25 A torrent of similar cases have been filed in the past several months, many of which appear to be  
26 simply using the federal courts as an avenue to collect money. As one judge aptly observed:

The Court is familiar with lawsuits like this one. [Citations omitted.]

1 expedited discovery only as to Doe 1 and recommend that the remaining Doe defendants be  
2 dismissed without prejudice under Federal Rule of Civil Procedure 21.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Plaintiff's ex parte application and motion for leave to take expedited  
5 discovery (dkt. no. 4) is granted in part;

6 2. Plaintiff may immediately serve a Rule 45 subpoena on the ISP Charter  
7 Communications to obtain the following information about the subscriber (defendant John  
8 Doe 1) corresponding to the IP address 75.128.68.154: *name, address, telephone number, and e-*  
9 *mail address*. The subpoena shall have a copy of this order attached.

10 3. The ISP, in turn, shall serve a copy of the subpoena and a copy of this order  
11 upon its relevant subscriber within 30 days from the date of service upon it. The ISP may serve  
12 the subscriber using any reasonable means, including written notice sent to the subscriber's last  
13 known address, transmitted either by first-class mail or via overnight service, or by e-mail notice.

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

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

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

1           4. The subscriber and the ISP shall each have 30 days from the respective dates of  
2 service upon them to file any motions contesting the subpoena (including a motion to quash or  
3 modify the subpoena). If that period elapses without the filing of a contesting motion, the ISP  
4 shall have ten (10) days thereafter to produce the information responsive to the subpoena to  
5 plaintiff.

6           5. The subpoenaed ISP shall preserve any subpoenaed information pending the  
7 production of the information to plaintiff and/or the resolution of any timely-filed motion  
8 contesting the subpoena.

9           6. The ISP that receives a subpoena pursuant to this order shall confer with  
10 plaintiff before assessing any charge in advance of providing the information requested in the  
11 subpoena. If the ISP elects to charge for the costs of production, it shall provide plaintiff with a  
12 billing summary and cost reports.

13           7. Any information disclosed to plaintiff in response to a Rule 45 subpoena may  
14 not be used for any improper purpose and may only be used for protecting plaintiff's rights as set  
15 forth in the Complaint; and

16           IT IS HEREBY RECOMMENDED that Does 2-7 be dismissed without prejudice.

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

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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: July 13, 2012

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5 CAROLYN K. DELANEY  
6 UNITED STATES MAGISTRATE JUDGE

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9 collins.1452.exdisc

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