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

MEDIA PRODUCTS, INC. dba  
DEVIL’S FILM, a California  
Corporation,

Plaintiff,

No. 2:12-cv-01937 LKK DAD

vs.

DOES 1-128, inclusive,  
Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

In this action plaintiff alleges that Doe defendants 1-128 infringed on its copyright with respect to a pornographic motion picture, the graphic title of which is identified in plaintiff’s complaint. Specifically, plaintiff alleges that in the course of monitoring Internet-based infringement of its copyrighted content, its agents observed unlawful reproduction and distribution of the subject motion picture by the 128 Doe defendants via the Bit Torrent file transfer protocol. Although plaintiff does not know the names of the Doe defendants, its 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 128 Doe defendants are identified in an exhibit to plaintiff’s complaint.

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, e-mail addresses, Media Access Control  
3 (“MAC”) address, and the ISP’s terms of service applicable for each of the 128 Doe defendants.  
4 With respect to the requested expedited discovery as to Doe 1, the court finds plaintiff has shown  
5 good cause to conduct expedited discovery and the request will be granted.<sup>1</sup> With respect to the  
6 remaining Doe defendants, however, it appears that plaintiff’s joinder of unrelated defendants is  
7 improper under Federal Rule of Civil Procedure 20. Given the technical complexities of  
8 BitTorrent swarm functions,<sup>2</sup> it appears unlikely that the 128 Doe defendants engaged in any  
9 coordinated effort or concerted activity. See, e.g., Boy Racer, Inc. v. Does 1-60, No. C 11-01738

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11 <sup>1</sup> Plaintiff does not address the relevance of the MAC address or how it will aid plaintiff  
12 in discovering the identity of any Doe defendant . Nor has plaintiff addressed how discovering  
13 the ISP’s terms of service applicable to each Doe defendant will aid plaintiff in discovering their  
14 identity. Accordingly, the court finds that plaintiff has not shown good cause for an order  
15 authorizing the production of the MAC address or the ISP’s terms of service pursuant to  
16 subpoena. Plaintiff’s request for an order authorizing plaintiff to subpoena the MAC address or  
17 the ISP’s terms of service of any Doe defendant will therefore be denied without prejudice.

18 <sup>2</sup> The BitTorrent protocol has been summarized as follows:

19 In the BitTorrent vernacular, individual downloaders/distributors  
20 of a particular file are called “peers.” The group of peers involved  
21 in downloading/distributing a particular file is called a “swarm.” A  
22 server which stores a list of peers in a swarm is called a “tracker.”  
23 A computer program that implements the BitTorrent protocol is  
24 called a BitTorrent “client.”

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

1 SI, 2011 WL 3652521, at \*4 (N.D. Cal. Aug. 19, 2011) (“Because Doe defendants 2-60 were  
2 improperly joined in the matter, the Court is authorized under Rule 21 to ‘drop’ these  
3 defendants.”) Under these circumstances, permissive joinder under Federal Rule of Civil  
4 Procedure 20(a)(2) is not warranted.<sup>3</sup> See Third Degree Films, Inc. v. Does 1-131, 280 F.R.D.  
5 493, 495- 500 (D. Ariz. 2012) (Surveying the various approaches to such cases and discovery  
6 requests taken by district courts around the country, determining that the joinder question should  
7 be addressed sua sponte at the outset of the litigation and ultimately dismissing Does 2 through  
8 131 without prejudice and granting the requested expedited discovery only with respect to Doe  
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10 <sup>3</sup> The court has additional concerns regarding plaintiff’s request for expedited discovery.  
11 A great number of similar cases have been filed in the past several months in this and other  
12 District Courts, many of which appear to be simply using the federal courts as an avenue to  
13 collect money. As one judge aptly observed:

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

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

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

1 defendant 1.) Accordingly, the court will authorize expedited discovery only as to Doe 1 and  
2 recommend that the remaining Doe defendants be dismissed without prejudice pursuant to  
3 Federal Rule of Civil Procedure 21.

4 Accordingly, IT IS HEREBY ORDERED that:

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

7 2. Plaintiff may immediately serve a Rule 45 subpoena on the ISP Sprint PCS to  
8 obtain the following information regarding the subscriber (defendant John Doe 1) corresponding  
9 to the IP address 107.38.254.7: *name, address, and e-mail address*. The subpoena shall have a  
10 copy of this order attached.

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

15 4. The subscriber and the ISP shall each have 30 days from the respective dates of  
16 service upon them to file any motions contesting the subpoena (including a motion to quash or  
17 modify the subpoena). If that period elapses without the filing of a contesting motion, the ISP  
18 shall have fourteen (14) days thereafter to produce the information responsive to the subpoena to  
19 plaintiff.

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

23 6. The ISP that receives a subpoena pursuant to this order shall confer with  
24 plaintiff before assessing any charge in advance of providing the information requested in the  
25 subpoena.

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

4           8. Plaintiff's request for an order authorizing plaintiff to subpoena the Media  
5 Access Control address of any Doe defendant is denied without prejudice.

6           9. Plaintiff's request for an order authorizing plaintiff to subpoena the ISP's terms  
7 of service applicable for any Doe defendant is denied without prejudice

8           In addition, IT IS HEREBY RECOMMENDED that Does 2-128 be dismissed  
9 without prejudice.

10           These findings and recommendations are submitted to the United States District  
11 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
12 fourteen days after being served with these findings and recommendations, any party may file  
13 written objections with the court and serve a copy on all parties. Such a document should be  
14 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the  
15 objections shall be served and filed within seven days after service of the objections. The parties  
16 are advised that failure to file objections within the specified time may waive the right to appeal  
17 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: October 4, 2012.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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