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 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14 Libyan Jamahiriya Broadcasting
 15 Corporation,

16 Plaintiff,

17 vs.

18 Abdalla Saleh,

19 Defendant.

Civil Action No. 5:10-CV-03713-JF PVT

EX PARTE APPLICATION FOR ORDER
 AUTHORIZING ALTERNATE SERVICE
 OF PROCESS ON DEFENDANT PURSUANT
 TO F.R.C.P. 4(f)(3); MEMORANDUM OF
 POINTS AND AUTHORITIES IN SUPPORT
 THEREOF

[Filed concurrently the Declarations of Al Duncan
 and John Fuisz as well as an [proposed] Order]

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 24 **EX PARTE APPLICATION**

1 Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) seeks an order
2 authorizing service of the Summons and Complaint in this matter upon Defendant Abdalla Saleh
3 via e-mail, pursuant to Federal Rule of Civil Procedure 4(f)(3).

4 Such application is made upon the grounds that LJBC has not been able to locate Defendant
5 despite reasonable diligence because Defendant is purposefully concealing his location.

6 Moreover, the Defendant has already consented to the jurisdiction of this district in his 17 U.S.C.
7 §512 counter-designation in which he stated under penalty of perjury:

8 I hereby consent to the jurisdiction of the Federal District Court for the district in
9 which I reside (or if my address is outside of the United States, the judicial district
10 in which YouTube is located, and will accept service of process from the
11 claimant.)

12 Declaration of John R. Fuisz at ¶3 (Exhibit B).

13 Such application is based upon this Application, the Memorandum of Points and
14 Authorities hereto, the Declarations of Al Duncan and John R. Fuisz, and exhibits thereto, filed
15 concurrently herewith, and the complete files and records of this action, and other such matters
16 that may be considered by the Court.

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18
19 Dated: September 27, 2010

The Fuisz Law Firm

20
21 /s/ John R. Fuisz
John R. Fuisz (*pro hac vice*)

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23 **Banie & Ishimoto LLP**

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25 /s/ Jennifer Ishimoto
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26 *Attorneys for Plaintiff*
27 *Libyan Jamahiriya Broadcasting Corporation*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. NOTICE

As explained in detail below and in the accompanying Declarations of Al Duncan, Private Investigator, and John R. Fuisz, counsel for Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”), Plaintiff has not been able to locate the Defendant Abdalla Saleh who is subject to this *Ex Parte* Application. Civil Local Rule 7-10 allows the *ex parte* application as long as the application is permitted by another statute or rule. Here, California Rule of Court Rule 3.1204(b) permits an application for an *ex parte* order to proceed without notice upon a showing that the applicant in good faith attempted to inform the opposing party but was unable to do so. Because Plaintiff has not been able to locate Defendant, Plaintiff has resorted to filing this *Ex Parte* Application for an order authorizing service of the Summons and Complaint in this matter upon Defendant.

II. INTRODUCTION

Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) initiated this action against Defendant Abdalla Saleh, for copyright infringement (Counts 1-4). Pursuant to Federal Rule of Civil Procedure 4(f)(3), Plaintiff requests an order allowing service of process on the Defendant via email. Email service is appropriate and necessary in this case because Defendant (1) provided YouTube LLC an incorrect physical address and (2) used a yahoo.com email account to communicate with YouTube LLC and appears to rely on email for communication. Notwithstanding the Defendant’s concealment of his physical location, Plaintiff still has the ability to contact Defendant directly and provide notice of Plaintiff’s claims against him.

Absent the ability to serve the Defendant by email, Plaintiff will almost certainly be left without the ability to pursue a remedy.

1 **II. STATEMENT OF FACTS**

2 Plaintiff alleges and can demonstrate that an individual identified as “abdoellibie” posted
3 videos that contain the un-authorized use and un-authorized alteration, including removal of
4 names and authors of the copyrighted materials.

5 Plaintiff LJBC provided YouTube LLC with Notification under the United States Digital
6 Millennium Copyright Act (“DMCA”), 17 U.S.C. §512 that an individual with the user name
7 “abdoellibie” posted materials that infringed upon one or more LJBC copyrights. Declaration of
8 John R Fuisz at ¶2 (Exhibit A).

9 Defendant, “abdoellibie,” using the email address abdoellibie@yahoo.com filed a counter-
10 designation. In the counter-designation, “abdoellibie” identified himself as

11 Name, address, and telephone number:

12 Abdallah Saleh,

13 20 Shallmar Blvd, Toronto ON

14 Tel.: 6476286321

15 E-mail: abdoellibie@yahoo.com

16 YouTube user Account Name: Abdoellibie

17 Decl. of Fuisz at ¶3 (Exhibit B). In addition, Defendant stated under penalty of perjury:

18 I hereby consent to the jurisdiction of the Federal District Court for the district in
19 which I reside (or if my address is outside of the United States, the judicial district
20 in which YouTube is located, and will accept service of process from the
21 claimant.)

22 Decl. of Fuisz at ¶3 (Exhibit B).

23 YouTube LLC is located at 901 Cherry Ave, San Bruno, California 94066. Decl. of Fuisz
24 at ¶4.

25 On August 20, 2010 this lawsuit was filed. That same day, 17 U.S.C. §512(g) Notice of
26 this lawsuit was provided to YouTube LLC via fax and email (fax 650.872.8513 and email
27 copyright@youtube.com) and by email to Abdalla Saleh (email abdoellibie@yahoo.com). Decl.
28 of Fuisz at ¶5 (Exhibit C).

1 On August 21, 2010, the Civil Cover Sheet, Complaint, Summons, Certification of
2 Interest, Application for Pro Hac Vice, Order Setting Initial Case Management Conference and
3 ADR Deadlines, Civil Standing Orders for Magistrate Judge Joseph C. Spero, Notice of Rule
4 Discontinuing Mail Service, Notice of Assignment of Case and Order of Chief Judge In Re:
5 Electronic Filing was sent by U.S. Post Office Global Express to Abdalla Saleh, 20 Shallmar Blvd,
6 Toronto ON, Canada. Decl. of Fuisz at ¶6 (Exhibit D). The address 20 Shallmar is an apartment
7 building and requires an apartment number for delivery, such that the August 21, 2010 package
8 has not been able to be delivered. Decl. of Fuisz at ¶6 (Exhibit E).

9 Private Investigator, Al Duncan, was retained to find a proper address for Defendant. As
10 of September 13, 2010, Addalla Saleh does not have an Ontario driver's license or phone records
11 under his name at 20 Shallmar Blvd. Defendant has no property records or liens registered under
12 his name. All available reporting services to the Private Investigator reveal no information under
13 Defendant's name. Declaration of Al Duncan.

14 On or about September 14, 2010, Plaintiff noticed that Defendant has begun to remove the
15 accused videos. For example, the posting on blip.tv identified at Paragraph 11 of the Complaint
16 has been removed by the poster. It is unknown whether the Defendant is keeping evidence or
17 destroying the evidence in this case or whether Defendant will re-post the infringing material
18 while continuing to evade this Court.

19 **III. ARGUMENT**

20 **A. The Court may Authorize Service via Email pursuant to FRCP 4(f)(3)**

21 Federal Rule of Civil Procedure 4(f)(3) allows this Court to authorize service of process to
22 be made on an individual in a foreign country by any means not prohibited by international
23 agreement as the Court directs. *Rio Properties Inc. v. Rio International Interlink*, 284 F.3d 1007,
24 1014 (9th Cir. 2002). "By its plain language, service under Rule 4(f)(3) must be (1) directed by
25 the Court; and (2) not prohibited by international agreement. No other limitations are evident
26 from the text." *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 561 (E.D.
27 Tenn. 2004)(Decl. of Fuisz at ¶7 (Exhibit F)). Rule 4 does not require a party to attempt service

1 of process by those methods enumerated in 4(f) subsections (1) and (2) before petitioning for
2 alternative relief under Rule 4(f)(3). *Rio Properties Inc.*, 284 F.3d at 1015.

3 In *Rio Properties*, the Ninth Circuit offered a detailed analysis of service of process under
4 Rule 4(f):

5 By all indications, court-ordered service under Rule 4(f)(3) is a favored as service
6 available under Rule 4(f)(1) and Rule 4(f)(2). Indeed, Rule 4(f)(3) is one of three
7 separately numbered subsections in Rule 4(f), and each subsection is separated
8 from the one previous merely by the simple conjunction “or.” Rule 4(f)(3) is not
9 subsumed within or in any way dominated by Rule 4(f)’s other subsections; it
10 stands independently, on equal footing. Moreover, no language in Rules 4(f)(1) or
4(f)(2) indicate their primacy, and certainly Rule 4(f)(3) includes no qualifiers or
limitations which indicate its availability only after attempting service of process
by other means.

11 Thus, examining the language and structure of Rule 4(f) and the accompanying
12 advisory committee notes, we are left with the inevitable conclusion that service of
13 process under Rule 4(f)(3) is neither a “last resort” nor “extraordinary relief.” It is
14 merely one means among several which enables service of process on an
international defendant.

15 *Rio Properties*, 284 F.3d at 1015. (citations omitted).

16 No matter the method of service of process selected, such process must satisfy the
17 constitutional requirement of due process. “To meet this requirement, the method of service
18 crafted by the district court must be ‘reasonably calculated, under all the circumstances, to apprise
19 interested parties of the pendency of the action and afford them an opportunity to present their
20 objections.’” *Rio Properties*, 284 F.3d at 1016. A number of Courts have held that alternate
21 forms of service pursuant to Rule 4(f)(3), including email service, are appropriate and may be the
22 only means of effective service of process “when faced with an international e-business scofflaw,
23 playing hide-and-seek with the federal court, email may be the only means of effecting service of
24 process.” *Rio Properties*, 284 F.3d at 1018. *See also Williams-Sonoma, Inc. v. FriendFinder*,
25 2007 WL 4973848 (N.D. Cal. 2007) (Decl. of Fuisz at ¶8 (Exhibit G)). Plaintiff submits that
26 allowing email service in the present case is appropriate and comports with constitutional notions
27

1 of due process, particularly given the Defendant’s decision to conduct their activity based on
2 Internet anonymity.

3 Here, service of process by email on Defendant will satisfy due process by apprising him
4 of the action and giving him the opportunity to answer Plaintiff’s claims. As set forth in the
5 Declarations of John Fuisz and Al Duncan, Defendant communicated with YouTube to file a
6 counter-designation and provided an address and phone number that are not valid. The Defendant
7 has communicated bywith email. Email service on the Defendant is appropriate and
8 constitutionally acceptable in a case such as this, where LJBC is unable to personally serve the
9 Defendant at a physical address and has proven that email is the most effective means for
10 providing the defendant notice of the litigation. See *Rio Properties*, 284 F.3d at 1017 (“[N]ot
11 only that service of process by email was proper – that is, reasonably calculated to apprise [the
12 defendant] of the pendency of the action and afford it an opportunity to respond – but in this case,
13 it was the methods of service most likely to reach [the defendant].”). See also *Popular*
14 *Enterprises*, 225 F.R.D. at 562 (Decl. of Fuisz at ¶7 (Exhibit F)) (“Under the facts and
15 circumstances presented here, Rule 4(f)(3) clearly authorizes the court to direct service upon
16 defendant by email. The rule is expressly designed to provide courts with broad flexibility in
17 tailoring methods of service to meet the needs of particularly difficult cases. Such flexibility
18 necessarily includes the utilization of modern communication technologies to effect service when
19 warranted by the facts.”).

22
23 **B. Email Service is Not Prohibited by International Agreement**

24 As set forth in the Declarations of Al Duncan and John R Fuisz, prior to the filing of this
25 application, LJBC diligently investigated the Defendant’s address, without success. Thus, as a
26 result of Defendant’s own effort to conceal his location, LJBC is unable to determine Defendant’s
27

1 physical whereabouts. Based on Defendant’s counter-designation, good cause exists for believing
2 that Defendant resides in Canada.

3 The United States and Canada are both signatories to the Hague Convention on the
4 Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (the
5 “Convention”) Decl. of Fuisz at ¶12. “Compliance with the Convention is mandatory in all cases
6 to which it applies.” *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 705 (1988). However,
7 according to Article 1 of the Convention, the “Hague Convention does not apply in cases where
8 the address of the foreign party to be served is unknown. 20 U.S.T. 361 (U.S.T. 1969).” *BP*
9 *Products of North America, Inc. v. Dagra*. 236 F.R.D. 270, 271 (E.D. Va. 2006) (Decl. of Fuisz at
10 ¶9 (Exhibit H)); *Popular Enterprises*, 225 F.R.D. at 562 (Decl. of Fuisz at ¶7 (Exhibit F)). As
11 the address of the Defendant is not known, LJBC respectfully submits that the Convention does
12 not apply in this case.
13

14 Email service has been previously used with Canadian defendants. In *MPS IP Services*
15 *Corp. v. Modis Communications, Inc.*, 2007 WL 723841 (M.D. Fla. 2007)(Dkt. 11) (Decl. of
16 Fuisz at ¶10 (Exhibit I)), the Court approved email service to a defendant located in Canada.
17 Regardless, though the Convention does not expressly authorize email service, the Convention
18 does not preclude it either, and thus, is no bar to the court-directed email service under Rule
19 4(f)(3). In fact, U.S. Courts have routinely authorized international service and email service
20 notwithstanding the applicability of the Convention. *See, e.g. Brockmeyer v. May*, 383 F.3d 798,
21 800 (9th Cir. 2004)(service of process by international mail); *Nanya Technology Corp. v. Fujitsu*
22 *Ltd.*, 2007 WL 269087 (D. Guam 2007)(Decl. of Fuisz at ¶11 (Exhibit J))(email service).
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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 Libyan Jamahiriya Broadcasting
Corporation,

5 Plaintiff,

6 vs.

7 Abdalla Saleh,

8 Defendant.
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Civil Action No. 5:10-CV-03713-JF PVT

[PROPOSED] ORDER

10 WHEREAS Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) filed its Ex
11 Parte Application for Order Authorizing Alternate Service of Process on Defendants Pursuant to
12 Federal Rules of Civil Procedure 4(f)(3) (“Plaintiff’s Application”);

13
14 WHEREAS Plaintiff has shown good cause why leave should be granted allowing service
15 of the Summons and Complaint in this matter upon Defendant Abdalla Saleh via email;

16 The Court, having read and considered the pleadings, declarations and exhibits on file in
17 this matter and having reviewed such evidence as was presented in regards to Plaintiff’s
18 Application, hereby grants Plaintiff’s Application and grants leave to Plaintiff to serve the
19 Summons and Complaint upon Defendant by email at the electronic mail address

20 abdoellibie@yahoo.com.

21 **IT IS SO ORDERED**

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23
24 DATED: _____

UNITED STATES DISTRICT JUDGE