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 11  
 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* FOR APPLICATION FOR ORDER  
 AUTHORIZING ALTERNATE SERVICE OF  
 PROCESS ON DEFENDANT PURSUANT TO  
 F.R.C.P. 4(f)(3) BY PUBLICATION OR IN THE  
 ALTERNATIVE ENTRY OF DEFAULT;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently the Declaration of John Fuisz  
 as well as an [proposed] Order]

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 22  
 23  
 24  
 25 **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 publication, pursuant to Federal Rule of Civil Procedure 4(f)(3), or in the alternative for  
4 default based on the previous emailed Complaints and summons and Defendant Saleh’s  
5 agreement to accept service.

6 On August 10, 2010, Defendant Saleh submitted a counter-designation under 17 U.S.C.  
7 §512 in which he swore under oath that he “will accept service of process from claimant.” On  
8 August 20, 2010 this lawsuit was filed and Defendant Saleh was provided with an email to  
9 [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) with a copy of the Complaint. Dkt. No. 12, Fuisz Dec. at 5 (Exhibit C).  
10 On September 27, 2010, Plaintiff filed an Ex Parte for Application of Order Authorizing  
11 Alternate Service of Process. Dkt. No. 12. On September 27, 2010, counsel sent an email to  
12 [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) containing the Ex Parte motion and all exhibits. Fuisz Dec. at ¶2. On  
13 October 14, 2010, this Court granted an Order authorizing service by email. On October 14,  
14 2010, both Fuisz and Ishimoto attempted to serve [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) by email with the  
15 Complaint and Summons, but the emails were returned as being undeliverable because the email  
16 account had been deactivated during the intervening period. Fuisz Dec. ¶3.

17 Despite having filed a counter-designation under oath agreeing to the jurisdiction of this  
18 Court and to agreeing to accept service, Defendant Saleh appears to be actively evading service of  
19 process. Accordingly, LJBC requests permission to perfect service by way of publication or in  
20 the alternative, for an order holding Defendant Saleh in default based on his counter-designation  
21 under 17 U.S.C. §512 and the laws of Ontario that permit service to be dispensed with under  
22 appropriate circumstances.

23 Such application is made upon the grounds that LJBC has not been able to locate  
24 Defendant despite reasonable diligence, because defendant is purposefully concealing his  
25 location, and thus LJBC has been unable to serve the defendant in any other manner as allowed  
26 under the Federal Rules and/or the California Code of Civil Procedure. As shown by the  
27 Complaint a cause of action for damages exists against the Defendant.



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. NOTICE**

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

13  
14 **II. INTRODUCTION**

15 Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) is suing Defendant  
16 Abdalla Saleh, for copyright infringement (Counts 1-4). Defendant agreed under oath to accept  
17 service but has been actively evading service by providing an incorrect address and by canceling  
18 his email address after this Court authorized service by email. Pursuant to Federal Rule of Civil  
19 Procedure 4(f)(3), Plaintiff requests an order allowing service of process on the defendant by  
20 publication. Publication is appropriate and necessary in this case because defendant (1) provided  
21 YouTube LLC an incorrect address, (2) relied on electronic mail for communication and (3)  
22 terminated his email account prior to this Court authorizing service by email. Further, Defendant  
23 provided a counter-designation under 17 U.S.C. §512 in which he swore under oath that he “will  
24 accept service of process from claimant.”

25 Notwithstanding the Defendant’s concealment of his physical location, Plaintiff still has  
26 the ability to provide Defendant with notice of Plaintiff’s claims against him.

1 Absent the ability to serve the Defendant by publication, Plaintiff will almost certainly be  
2 left without the ability to pursue a remedy absent this Court holding Defendant in default.

3 **II. STATEMENT OF FACTS**

4 Plaintiff alleges and can demonstrate that an individual identified as “abdoellibie” posted  
5 videos that contain the un-authorized use and un-authorized alteration, including removal of  
6 names and authors, of the copyrighted materials.  
7

8 Plaintiff LJBC provided YouTube LLC with Notification under the United States Digital  
9 Millennium Copyright Act (“DMCA”), 17 U.S.C. §512 that an individual with the user name  
10 “abdoellibie” posted materials that infringed upon one or more LJBC copyrights. Dkt. No. 12,  
11 Declaration of John R Fuisz at ¶2 (Exhibit A).

12 On August 10, 2010, Defendant, “abdoellibie,” using the email address  
13 [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) filed a counter-designation. In the counter-designation, “abdoellibie”  
14 identified himself as  
15

16 Name, address, and telephone number:  
17 Abdallah Saleh,  
18 20 Shallmar Blvd, Toronto ON  
19 Tel.: 6476286321  
E-mail: [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com)  
YouTube user Account Name: Abdoellibie

20 Dkt. 12, Decl. of Fuisz at ¶3 (Exhibit B). In addition, Defendant stated:

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

24 Dkt. 12, Decl. of Fuisz at ¶3 (Exhibit B).

25 YouTube LLC is located at 901 Cherry Ave, San Bruno, California 94066. Dkt. 12, Decl.  
26 of Fuisz at ¶4.  
27

1 On August 20, 2010 this lawsuit was filed. That same day, 17 U.S.C. §512(g) Notice of  
2 this lawsuit was provided to YouTube LLC via fax and email (fax 650.872.8513 and email  
3 [copyright@youtube.com](mailto:copyright@youtube.com)) and by email to Abdalla Saleh (email [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com)). Dkt.  
4 No. 12, Decl. of Fuisz at ¶5 (Exhibit C).

5 On August 21, 2010, the Civil Cover Sheet, Complaint, Summons, Certification of  
6 Interest, Application for Pro Hac Vice, Order Setting Initial Case management Conference and  
7 ADR Deadlines, Civil Standing Orders for Magistrate Judge Joseph C. Spero, Notice of Rule  
8 Discontinuing Mail Service, Notice of Assignment of Case and Order of Chief Judge In Re:  
9 Electronic Filing was sent by U.S. Post Office Global Express to Abdalla Saleh, 20 Shallmar Bvd,  
10 Toronto ON, Canada. Dkt. No. 12, Decl. of Fuisz at ¶6 (Exhibit D). 20 Shallmar is an apartment  
11 building and requires an apartment number for delivery such that the August 21, 2010 package  
12 has not been able to be delivered. Dkt. No. 12, Decl. of Fuisz at ¶6 (Exhibit E).

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

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

1 On September 27, 2010, Plaintiff filed an Ex Parte for Application of Order Authorizing  
2 Alternate Service of Process. Dkt. No. 12.

3 On September 27, 2010, counsel sent an email to [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) containing the  
4 Ex Parte motion and all exhibits. Fuisz Dec. at ¶2.

5 On October 14, 2010, this Court issued an Order granting Plaintiff's motion, authorizing  
6 service by email. Dkt. No. 14.

7 On October 14, 2010, both Fuisz and Ishimoto attempted to serve [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com)  
8 by email with the Complaint and Summons but the emails were returned as being undeliverable.  
9 Fuisz Dec. at ¶3.  
10

### 11 **III. ARGUMENT**

#### 12 **A. The Court may Authorize Service via publication pursuant to FRCP 4(f)(3)**

13 Federal Rule of Civil Procedure 4(f)(3) allows this Court to authorize service of process to  
14 be made on an individual in a foreign country by any means not prohibited by international  
15 agreement as the Court directs. *Rio Properties Inc. v. Rio International Interlink*, 284 F.3d 1007,  
16 1014 (9th Cir. 2002). "By its plain language, service under Rule 4(f)(3) must be (1) directed by  
17 the Court; and (2) not prohibited by international agreement. No other limitations are evident  
18 from the text." *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 561 (E.D.  
19 Tenn. 2004)(Decl. of Fuisz at ¶7 (Exhibit F)). Rule 4 does not require a party to attempt service  
20 of process by those methods enumerated in 4(f) subsections (1) and (2) before petitioning for  
21 alternative relief under Rule 4(f)(3). *Rio Properties Inc.*, 284 F.3d at 1015.  
22  
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1 In *Rio Properties*, the Ninth Circuit offered a detailed analysis of service of process under  
2 Rule 4(f):

3 By all indications, court-ordered service under Rule 4(f)(3) is a favored as service  
4 available under Rule 4(f)(1) and Rule 4(f)(2). Indeed, Rule 4(f)(3) is one of three  
5 separately numbered subsections in Rule 4(f), and each subsection is separated  
6 from the one previous merely by the simple conjunction “or.” Rule 4(f)(3) is not  
7 subsumed within or in any way dominated by Rule 4(f)’s other subsections; it  
8 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.

\*\*\*

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

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

14 No matter the method of service of process selected, such process must satisfy the  
15 constitutional requirement of due process. “To meet this requirement, the method of service  
16 crafter by the district court must be ‘reasonably calculated, under all the circumstances, to apprise  
17 interested parties of the pendency of the action and afford them an opportunity to present their  
18 objections.” *Rio Properties*, 284 F.3d at 1016.

19 In the instant case, service of process by publication on Defendant will satisfy due process  
20 by apprising him of the action and giving him the opportunity to answer Plaintiff’s claims. As  
21 previously briefed and ruled upon by this Court, email service was permitted to apprise Defendant  
22 of this suit. After receiving notice of the Ex Parte Application, but prior to issuance of an Order  
23 by the Court, Defendant’s email address was disabled.



1 Canadian case law appears to indicate that the Plaintiff must satisfy the Court that the  
2 proposed method of service will have some likelihood or a reasonable possibility of bringing the  
3 action to the defendant. As set forth in *Laframboise v. Woodward*, 2002 Can Lii 49471 (ON  
4 S.C.), the Court discussed the appropriateness of substitute service by way of publication in a  
5 newspaper (two consecutive editions).<sup>3</sup> Therefore, Plaintiff seeks permission to perfect service  
6 through publication in a Toronto newspaper or a newspaper local to YouTube, which is a  
7 jurisdiction that Defendant subjected himself to under oath.

8 **C. Alternative Order of Default**

9 The instant case is complicated by Defendant's use of an incomplete address in the 17  
10 U.S.C. §512 counter-designation. At this point, it is unknown if the address was incomplete or if  
11 it was fake. All that is known is that the email address worked and was cut-off before this Court  
12 could authorize service by email. Defendant did state pursuant to the requirements of §512 that:

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

17 Yet, Defendant has not accepted service. If the defendant's whereabouts are unknown, Canadian  
18 law permits the dispensing with service of process upon showing that reasonable steps have been  
19 taken to locate the party to personally serve him.

20 Federal Rule of Civil Procedure, Rule 4(f)(2)(A) permits service "as prescribed by the  
21 foreign country's law for service in that country in an action in its courts of general jurisdiction."  
22 Rule 16.04 of the Ontario Rules of Civil Procedure as noted above permits "where necessary in  
23 the interest of justice, may dispense with service." If this Court determines that publication is  
24 unlikely to result in their being some likelihood or a reasonable possibility that Defendant will

25 \_\_\_\_\_  
26 <sup>3</sup> <http://www.canlii.org/en/on/onsc/doc/2002/2002canlii49471/2002canlii49471.pdf>  
27

1 receive effective service, Plaintiff requests that the Court follow Rule 16.04 and dispense with  
2 service or process and hold Defendant in default.

3 In the instant case, Defendant was provided with the Complaint on two occasions by  
4 email. Defendant was not provided with a copy of the summons, but the evidence appears to  
5 indicate that Defendant knows of this action and is attempting to avoid it.

6 **V. CONCLUSION**

7 For the foregoing reasons, Plaintiff respectfully requests that this Court grant the present  
8 Ex Parte Application to Serve the Summons and Complaint upon Defendant Abdalla Saleh by  
9 publication in a Toronto newspaper and/or local newspaper as directed by the Court. In the  
10 alternative, Plaintiff requests that this Court hold Defendant in default and enter judgment  
11 accordingly.

12  
13 Dated: November 17, 2010

**The Fuisz Law Firm**

14  
15 /s/John R. Fuisz  
John R. Fuisz (pro Hac)

16  
17 **Banie & Ishimoto LLP**

18  
19 /s/ Jennifer Ishimoto  
20 Jennifer Ishimoto (SBN 211845)

21 *Attorneys for Plaintiff*  
22 *Libyan Jamahiriya Broadcasting Corporation*

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.

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

[PROPOSED] ORDER

9  
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;

15 The Court, having read and considered the pleadings, declarations and exhibits on file in  
16 this matter and having reviewed such evidence as was presented in regards to Plaintiff’s  
17 Application, hereby:

18 **GRANTS / DENIES** Plaintiff’s Application and grants leave to Plaintiff to serve the  
19 Summons and Complaint upon Defendant by publication in an appropriate publication in  
20 Toronto, Canada; and/or

21 **GRANTS / DENIES** Plaintiff’s request to hold Defendant in default.

22  
23 **IT IS SO ORDERED**

24  
25 DATED: \_\_\_\_\_

\_\_\_\_\_  
26 JEREMY FOGEL  
27 UNITED STATES DISTRICT JUDGE

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