

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 THE THOMPSONS FILM, LLC,

10 Plaintiff,

11 v.

12 DOES 1 - 194,

13 Defendants.

Case No. C13-0560RSL

ORDER GRANTING MOTION TO
DISMISS AND GRANTING LEAVE
TO AMEND

14 This matter comes before the Court on a “Motion to Dismiss, or for More
15 Definite Statement” by defendants Kimberly Banks, Eric Morris, Doan’ nhi Nguyen, and
16 Gino Wall. Dkt. # 59. The question for the Court on a motion to dismiss is whether the
17 facts in the complaint sufficiently state a “plausible” ground for relief. Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 570 (2007). Although a complaint need not provide detailed
19 factual allegations, it must offer “more than labels and conclusions” and contain more
20 than a “formulaic recitation of the elements of a cause of action.” Twombly, 550 U.S. at
21 555. If the complaint fails to state a cognizable legal theory or fails to provide sufficient
22 facts to support a claim, dismissal is appropriate. Robertson v. Dean Witter Reynolds,
23 Inc., 749 F.2d 530, 534 (9th Cir. 1984).

24
25
26
ORDER GRANTING MOTION TO DISMISS
AND GRANTING LEAVE TO AMEND - 1

1 Having reviewed the memoranda and case law submitted by the parties,¹ the
2 Court finds as follows:

3 This action was filed on March 28, 2013, against 194 Doe defendants. Each
4 Doe defendant was identified only by an IP address linked to the on-line sharing of the
5 movie “The Thompsons.” The Court granted plaintiff’s motion to initiate early discovery
6 in order to obtain information sufficient to identify the owner of each IP address, but
7 noted that:

8 [Identifying the account holder may tell us very little about who actually
9 downloaded “The Thompsons” using that IP address. As one court noted,
10 “it is no more likely that the subscriber to an IP address carried out a
11 particular computer function . . . than to say an individual who pays the
12 telephone bill made a specific telephone call.” In re BitTorrent Adult Film
13 Copyright Infringement Cases, 2012 WL 1570765, at *3 (E.D.N.Y. May 1,
14 2012). In fact, it is less likely. Home wireless networks are ubiquitous,
15 meaning that a single IP address can simultaneously support multiple
16 computer devices throughout the home and, if not secured, additional
17 devices operated by neighbors or passersby. Thus, the risk of false
18 positives is very real. Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 243
19 (S.D.N.Y. 2012). It is not clear that plaintiff could, consistent with its
20 obligations under Fed. R. Civ. P. 11, make factual contentions regarding an
21 internet subscriber’s infringing activities based solely on the fact that he or
22 she pays the internet bill.

18 On October 17, 2013, plaintiff filed a First Amended Complaint naming seventeen
19 individual defendants. Five of the named defendants and the remaining Doe defendants
20 have been dismissed. Four of the named defendants filed this motion to dismiss, arguing
21 that plaintiff’s allegations, which are presented in the alternative, fail to state a claim for
22 relief that crosses the line between possible and plausible. The Court agrees.

24 ¹ The Court has considered the unpublished opinions submitted by the parties.
25 Defendants’ request for judicial notice (Dkt. # 60) is GRANTED. Because the issues and
26 arguments asserted in this case are substantially similar to those presented in Elf-Man, LLC v.
Cariveau, C13-0507RSL, defendants’ request for oral argument is DENIED.

1 To survive a motion to dismiss, a complaint must contain sufficient factual
2 matter, accepted as true, to state a claim to relief that is plausible on its face.
3 A claim is facially plausible when the plaintiff pleads factual content that
4 allows the court to draw the reasonable inference that the defendant is liable
5 for the misconduct alleged. Plausibility requires pleading facts, as opposed
6 to conclusory allegations or the formulaic recitation of elements of a cause
7 of action, and must rise above the mere conceivability or possibility of
8 unlawful conduct that entitles the pleader to relief. Factual allegations must
9 be enough to raise a right to relief above the speculative level. Where a
complaint pleads facts that are merely consistent with a defendant's
liability, it stops short of the line between possibility and plausibility of
entitlement to relief. Nor is it enough that the complaint is factually neutral;
rather, it must be factually suggestive.

10 Somers v. Apple, Inc., 72 F.3d 953, 959-60 (9th Cir. 2013) (internal quotation marks and
11 citations omitted). Plaintiff's complaint does not raise a plausible inference that any of
12 the named defendants are liable for direct, contributory, or indirect copyright
13 infringement. In the fact sections of the complaint, plaintiff carefully refrains from
14 alleging that the owners of the IP address – *i.e.*, the named defendants – are the ones who
15 utilized the internet access to download the copyrighted material. Rather, plaintiff alleges
16 that the IP address assigned to each defendant “was observed infringing Plaintiff's motion
17 picture” (Dkt. # 39 at ¶ 32) and that each named defendant either (a) downloaded the
18 BitTorrent “client” application and used it to download and share the copyrighted
19 material or (b) permitted, facilitated, or promoted the use of their internet connections by
20 others to download and share the copyrighted material (Dkt. # 39 at ¶ 25). Pursuant to
21 plaintiff's allegations, a particular defendant may have directly and intentionally stolen
22 plaintiff's copyrighted material, or she may simply have “facilitated” unauthorized
23 copying by purchasing an internet connection which an unidentified third party utilized to
24 download “The Thompsons.” Plaintiff provides no factual allegations that make one
25 scenario more likely than the other: both are merely possible given the alternative
26

1 allegations of the complaint.

2 Plaintiff argues that such alternative pleading is permissible under Fed. R.
3 Civ. P. 8(d)(2) and that “[i]f a party makes alternative statements, the pleading is
4 sufficient if any one of them is sufficient.” The critical defect in this case is not the
5 alternative pleading of claims of direct, contributory, and indirect infringement. Rather,
6 the problem arises from the alternative pleading of the facts that are supposed to support
7 those claims. The effect of the two “or” conjunctions means that plaintiff has actually
8 alleged no more than that the named defendants purchased internet access and failed to
9 ensure that others did not use that access to download copyrighted material. For the
10 reasons set forth below, these facts do not support any of the alternative claims asserted.
11 Rule 8(d)(2) does not, therefore, save plaintiff’s complaint.

12 **A. First Claim For Relief: Copyright Infringement**

13 Plaintiff’s claim of direct copyright infringement relies on a conclusory
14 allegation that the named defendants were personally involved in the use of BitTorrent
15 software to download “The Thompsons” and to further distribute the movie. The only
16 fact offered in support of this allegation is that each named defendant pays for internet
17 access, which was used to download and/or distribute the movie. As the Court previously
18 noted, however, simply identifying the account holder associated with an IP address tells
19 us very little about who actually downloaded “The Thompsons” using that IP address.
20 While it is possible that the subscriber is the one who participated in the BitTorrent
21 swarm, it is also possible that a family member, guest, or freeloader engaged in the
22 infringing conduct. The First Amended Complaint, read as a whole, suggests that
23 plaintiff has no idea who downloaded “The Thompsons” using a particular IP address.
24 Plaintiff has not alleged that a named defendant has the BitTorrent “client” application on
25 her computer, that the download or distribution is in some way linked to the individual
26

1 subscriber (as opposed to her account), that the defendant has acknowledged personal
2 involvement in the download and distribution, or even circumstances which might
3 increase the likelihood that the subscriber is the infringer (such as defendant’s living
4 arrangements or network details). Rather than provide specific facts tying the named
5 defendant to the infringing conduct, plaintiff merely alleges that her IP address “was
6 observed infringing Plaintiff’s motion picture” and guesses how that might have come
7 about.² While it is possible that one or more of the named defendants was personally
8 involved in the download, it is also possible that they simply failed to secure their
9 connection against third-party interlopers. Plaintiff has failed to adequately allege a claim
10 for direct copyright infringement.

11 **B. Second Claim For Relief: Contributory Infringement**

12 Plaintiff’s claim of contributory infringement relies on the allegation that
13 the named defendants materially contributed to others’ infringement of plaintiff’s
14 exclusive rights by participating in a BitTorrent swarm. For the reasons discussed above,
15 this allegation of personal involvement in a swarm is conclusory, and plaintiff has failed
16 to adequately allege a claim for contributory infringement.

17 **C. Third Claim For Relief: Indirect Infringement of Copyright**

18 Plaintiff alleges that the named defendants obtained internet access through
19 a service provider and “failed to secure, police and protect the use of their internet service
20

21 ² Plaintiff apparently concedes that it does not know the “circumstances concerning how
22 these Defendants’ IP addresses came to be used for the infringement of Plaintiff’s copyright,”
23 but argues that it should be allowed to conduct discovery because it cannot reasonably be
24 expected “to have procured such information at this stage of the proceeding.” Dkt. # 63 at 13
25 n.6. This argument “collides with what the Supreme Court said in Ashcroft v. Iqbal, 556 U.S.
26 662[, 678-79 (2009)]: ‘Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed
with nothing more than conclusions.’” Starr v. Baca, 652 F.3d 1202, 1219 (9th Cir. 2011). Mr.
Iqbal was required to have evidence of Attorney General Ashcroft’s subjective intent at the
pleading stage. Requiring plaintiff to allege facts giving rise to a plausible, not merely possible,
inference that it has named the correct defendant is no more onerous or unreasonable.

1 against illegal conduct, including the downloading and sharing of Plaintiff’s motion
2 picture by others.” Dkt. # 39 at ¶ 149. One may be liable for another’s direct
3 infringement where the circumstances give rise to a reasonable inference that the
4 defendant intentionally encouraged or promoted the infringement. See Sony Corp of Am.
5 v. Universal City Studios, Inc., 464 U.S. 417, (1984) (defendant is liable for infringing
6 uses of a product it distributes only if the product is not capable of substantial non-
7 infringing uses);³ Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913,
8 932 (2005) (“where evidence goes beyond a product’s characteristics or the knowledge
9 that it may be put to infringing uses, and shows statements or actions directed to
10 promoting infringement,” intentional inducement of infringement may be shown and
11 liability attach); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 727 (9th Cir. 2007)
12 (“[A]n actor may be contributorily liable for intentionally encouraging direct
13 infringement if the actor knowingly takes steps that are substantially certain to result in
14 such direct infringement.”).⁴ Plaintiff makes no allegations of intent or knowledge, nor
15 does it provide facts that would be necessary to support such conclusory allegations. See
16 Ashcroft v. Iqbal, 556 U.S. 662, 680-81, 686-87 (2009) (conclusory allegations of
17 knowledge and intent are not entitled to the presumption of truth when evaluating the
18 allegations of a complaint). As such, the allegations are insufficient to state a claim for
19 contributory infringement.

20 Plaintiff argues, however, that contributory infringement is a judge-made
21

22 ³ In Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 932 (2005),
23 the Supreme Court explained that the “incapable of non-infringing uses” test is used to evaluate
24 the intent of the defendant: “it may be presumed from distribution of [such] an article in
commerce that the distributor intended the article to be used to infringe another’s patent.”

25 ⁴ A defendant may also be liable for another’s infringing activity under the common law
26 doctrine of vicarious liability. Plaintiff has not provided any facts that would support such a
theory of liability in this case.

1 concept and the Court should entertain its admittedly novel theory of liability – that
2 defendants can be held liable for contributory infringement because they failed to take
3 affirmative steps to prevent unauthorized use of their internet access to download “The
4 Thompsons” – so that this area of the law can develop fully. While it is true that the
5 circumstances giving rise to a claim of contributory infringement have not all been
6 litigated and that courts will continue to analyze contributory liability claims in light of
7 common law principles regarding fault and intent (Perfect 10, 487 F.3d at 727), plaintiff’s
8 theory treads on an element of the claim that has already been fixed by the courts, namely
9 the requirement that defendant’s contribution to the infringement be intentional (Grokster,
10 545 U.S. at 930). A claim of novelty will not defeat a motion to dismiss where the
11 allegations fail to plead an essential element of the claim.

12
13 For all of the foregoing reasons, defendants’ motion to dismiss (Dkt. # 59)
14 is GRANTED. Plaintiff may have additional information regarding individual defendants
15 that would provide the necessary heft to its factual allegations of personal involvement
16 and/or intent and should be given an opportunity to remedy the deficiencies identified by
17 the Court. Plaintiff shall, therefore, have fourteen days from the date of this Order to file
18 a Second Amended Complaint that pleads factual content that allows the Court to draw
19 the reasonable inference that the named defendants are liable for the misconduct alleged.
20 Failure to file a timely and adequate pleading will result in the entry of judgment against
21 plaintiff and in favor of defendants.

22 Dated this 14th day of February, 2014.

23 
24 Robert S. Lasnik
25 United States District Judge
26