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

MALIBU MEDIA, LLC, a California
corporation,

Plaintiff,

No. 2:12-cv-2480 JAM DAD

vs.

JOHN DOES 1 through 32,
Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

In this action plaintiff alleges that Doe defendants 1 through 32 infringed on its copyright with respect to pornographic motion pictures, the graphic titles of which are 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 pictures by the 32 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 32 Doe defendants are identified in an exhibit to plaintiff's complaint.

1 On May 30, 2012, plaintiff filed an ex parte application for expedited discovery to
2 serve Rule 45 subpoenas on the ISPs to obtain the names, addresses, telephone numbers, e-mail
3 addresses and Media Access Control (“MAC”) addresses of the Doe defendants. (Doc. No. 7.)
4 On August 1, 2012, the previously assigned Magistrate Judge issued an order granting plaintiff’s
5 request.¹ (Doc. No. 8.) Thereafter, on September 5, 2012, John Doe #23 filed a motion to
6 dismiss and/or sever arguing, in part, that he has been improperly joined in this action. (Doc. No.
7 12.)

8 “[A] district court has the inherent power to revisit its non-final orders, and that
9 power is not lost when the case is assigned mid-stream to a second judge.” Dreith v. Nu Image,
10 Inc., 648 F.3d 779, 787-88 (9th Cir. 2011). See also City of L.A. v. Santa Monica BayKeeper,
11 254 F.3d 882, 888 (9th Cir. 2001) (district court is vested with the “power to reconsider its own
12 interlocutory order provided that the district court has not been divested of jurisdiction over the
13 order.”); United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986) (“All rulings of a trial court
14 are subject to revision at any time before the entry of judgment.”). “Generally stated,
15 reconsideration is appropriate where . . . it is necessary to correct clear error or prevent manifest
16 injustice.” Cachil Dehe Band of Wintun Indians Cmty. v. California, 649 F. Supp.2d 1063, 1069
17 (E.D. Cal. 2009) (citing Sch. Dist. No. 1J Multnomah Cnty., Oregon v. AC & S Inc., 5 F.3d
18 1255, 1263 (9th Cir. 1993)). See also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800,
19 817 (1988); Arizona v. California, 460 U.S. 605, 618 n. 8 (1983).

20 Here, the court has determined that reconsideration of the August 1, 2012 order
21 granting expedited discovery with respect to all 32 Doe defendants is appropriate in order to
22 prevent manifest injustice. In this regard, the undersigned finds that with respect to the requested
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24 ¹ On October 3, 2012, a related case order was issued relating ten civil actions filed by
25 plaintiff in 2012 in both divisions of this court, all of which named only Doe defendants and
26 involved plaintiff moving for expedited discovery. (Doc. No. 15.) As a result of that order, all of
those actions including this one were reassigned to the undersigned Magistrate Judge and to
District Judge John A. Mendez.

1 expedited discovery as to Doe 1, plaintiff has shown good cause to conduct expedited discovery
2 and plaintiff's ex parte application will be granted.² With respect to the remaining Doe
3 defendants, however, it appears clear to this court that plaintiff's joinder of unrelated defendants
4 is improper under Federal Rule of Civil Procedure 20. Given the technical complexities of
5 BitTorrent swarm functions,³ it appears unlikely that the 32 Doe defendants engaged in any
6 coordinated effort or concerted activity. See, e.g., Boy Racer, Inc. v. Does 1-60, No. C 11-01738
7 SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) ("Because Doe defendants 2-60 were
8 improperly joined in the matter, the Court is authorized under Rule 21 to 'drop' these
9

10 ² Plaintiff, however, does not address the relevance of the MAC address or how it will
11 aid plaintiff in discovering the identity of any Doe defendant. Moreover, because plaintiff will be
12 provided with the name, address and email address of Doe 1, the court finds that there is not
13 good cause at this time to authorize plaintiff to obtain the telephone number of Doe 1.
14 Accordingly, the court finds that plaintiff has not shown good cause for an order authorizing the
15 production of the MAC addresses or telephone number of any Doe defendant and plaintiff's
16 request for an order authorizing it to subpoena the MAC addresses or telephone number of any
17 Doe defendant will therefore be denied without prejudice.

18 ³ 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 defendants.”). Under these circumstances, permissive joinder under Federal Rule of Civil
2 Procedure 20(a)(2) is not warranted.⁴ See Third Degree Films, Inc. v. Does 1-131, 280 F.R.D.
3 493, 495- 500 (D. Ariz. 2012) (Surveying the various approaches to such cases and discovery
4 requests taken by district courts around the country, determining that the joinder question should
5 be addressed sua sponte at the outset of the litigation and ultimately dismissing Does 2 through
6 131 without prejudice and granting the requested expedited discovery only with respect to Doe
7 defendant 1.) Accordingly, the court will authorize expedited discovery only as to Doe 1 and

8 _____
9 ⁴ The court has additional concerns regarding plaintiff’s request for expedited discovery.
10 A great number of similar cases have been filed in the past several months in this and other
11 District Courts, many of which appear to be simply using the federal courts as an avenue to
12 collect money. As one judge aptly observed:

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

24 The federal courts are not cogs in a plaintiff’s copyright-
25 enforcement business model. The Court will not idly watch what
26 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.”). Here, these concerns find further support in the pro se
33 motions to dismiss and/or sever and to quash subpoena filed by Doe defendant #23 in this case.
34 (Doc. No. 12.)

1 will recommend that the remaining Doe defendants be dismissed without prejudice under Federal
2 Rule of Civil Procedure 21.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. The August 1, 2012 order granting plaintiff's ex parte application and motion
5 for leave to take expedited discovery (Doc. No. 8) is vacated.

6 2. Plaintiff's ex parte application and motion for leave to take expedited
7 discovery (Doc. No. 7) is granted in part.

8 3. Plaintiff may immediately serve a Rule 45 subpoena on the ISP Bright House
9 Networks to obtain the following information about the subscriber (defendant Doe 1)
10 corresponding to the IP address 174.134.1.43: *name, address, and e-mail address*. The subpoena
11 shall have a copy of this order attached.

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

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

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

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

1 8. 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 9. 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 10. Plaintiff's request for an order authorizing plaintiff to subpoena the telephone
7 number of any Doe defendant is denied without prejudice.

8 11. Plaintiff shall serve a copy of this order on any ISP that plaintiff previously
9 served a Rule 45 subpoena on in this action. The ISPs, in turn, shall serve a copy of this order
10 upon its relevant subscriber within 14 days from the date of service upon it. The ISP may serve
11 the subscriber using any reasonable means, including written notice sent to the subscriber's last
12 known address, transmitted either by first-class mail or via overnight service, or by e-mail notice.

13 In addition, IT IS HEREBY RECOMMENDED that:

14 1. Does 2-32 be dismissed without prejudice; and

15 2. The September 5, 2012, motion to dismiss and/or sever filed by Doe #23 (Doc.
16 No. 12) be denied as moot.

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: October 9, 2012.

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6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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