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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO**

11 MALIBU MEDIA, LLC,

12 Plaintiff,

13 vs.

14 JOHN DOE subscriber assigned IP address
107.128.208.141,

15 Defendant.
16
17

Case Number: 3:16-cv-5824-WHA

**RENEWED MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
EX-PARTE MOTION FOR LEAVE TO
SERVE A THIRD PARTY SUBPOENA
PRIOR TO A RULE 26(f) CONFERENCE**

Date: Thursday, February 23, 2017
Time: 8:00 AM
Place: Courtroom 8 – 19th Floor
Honorable Judge William H. Alsup

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, Malibu Media, (d/b/a “X-art.com”) operates a popular subscription based website where it displays its copyrighted material.¹ Plaintiff creates its own content, which is being infringed on a massive scale. The John Doe Defendant’s IP address has been habitually used to infringe Plaintiff’s copyrighted works. Accordingly, Plaintiff seeks leave to serve limited, immediate discovery on the John Doe Defendant’s Internet Service Provider, AT&T Internet Services (hereafter “ISP”) so that Plaintiff may learn Defendant’s true identity. Plaintiff is suing Defendant for using the Internet, specifically the BitTorrent file distribution network, to commit direct copyright infringement.

Because Defendant used the Internet to commit this infringement, Plaintiff only knows Defendant by his Internet Protocol (“IP”) address. Defendant’s IP address was assigned to the Defendant by his respective Internet Service Provider (“ISP”). Accordingly, the ISP can use the IP address to identify the Defendant.² Indeed, ISPs maintain internal logs that record the date, time, and customer identity for each IP address assignment made by that ISP. Materially, ISPs may maintain these logs for only a short period of time.

Plaintiff seeks leave of Court to serve a Rule 45 subpoena on the Defendant’s ISP. This subpoena will demand the true name and address of the Defendant. Plaintiff will only use this information to prosecute the claims made in its Complaint. Without this information, Plaintiff can neither serve Defendant nor pursue this lawsuit to protect its valuable copyrights.

II. FACTS

A. Online Copyright Infringement Through the BitTorrent Protocol is a Serious and Significant Threat to Plaintiff’s Business

Colette Pelissier is the owner of Malibu Media. See Exhibit A at ¶ 3. Ms. Pelissier developed the X-Art.com business plan in 2010 while still working full time as a realtor in the

¹ See Declaration of Colette Pelissier, attached hereto as Exhibit “A.”

² See Declaration of Patrick Paige, attached hereto as Exhibit “B.”

1 Los Angeles market. *Id.* at ¶ 4. X-Art.com was created to address the lack of artistically produced
2 adult oriented content suitable for upscale women and couples. *Id.* Ms. Pelissier chose the name
3 ‘X-Art’ to reflect her artistic aspirations, and began investing all of her available money and
4 resources into the production of content – particularly erotic movies with high production value
5 and a cinematic quality. *Id.* at ¶ 8. She knew that the adult content industry was in financial
6 crisis, and the odds of success for a new adult website were low. *Id.*

7 Her vision has come to fruition. Currently X-Art.com has tens of thousands of paying
8 subscribers, but Malibu Media is finding it hard to grow and maintain the memberships when so
9 many of the movies are being distributed for free, without authorization, by users of the Bittorrent
10 Network. *See generally id.* As X-Art's subscriber base has grown, production expenditures have
11 also grown. *Id.* at ¶ 9. Plaintiff spends over two million dollars a year producing content, and
12 millions more each year to run the business. *Id.* For the first several years of operation, X-Art did
13 not have significant issues with piracy. *Id.* at ¶ 10. However, once our content became well
14 known and highly desirable, X-Art movies started ranking as the most downloaded adult content
15 on several of the most popular torrent websites. *Id.* Malibu Media invests significant resources
16 into pursuing all types of anti-piracy enforcement, such as Digital Millennium Copyright Act
17 ("DMCA") takedown notices and direct efforts aimed at infringing websites. *Id.* at ¶ 21. Malibu
18 Media is even working with law enforcement to stop the piracy of its movies. *Id.* Despite sending
19 thousands of DMCA notices per week, the infringement continues. *Id.* at ¶ 22. And, if one
20 searches for “X-Art” on a torrent website, the site will reveal thousands of unauthorized torrents
21 available for free. *Id.* Plaintiff Malibu Media has filed suit in this judicial district and in judicial
22 districts across the country seeking to deter and stop the infringement.

23 Plaintiff won the first ever BitTorrent copyright infringement lawsuit to reach trial. *See*
24 *Malibu Media, LLC v. John Does 1, 6, 13, 14 and Bryan White*, 2013 WL 3038025 at n.1 (E.D.
25 Pa. June 18, 2013). In his Memorandum Report after the conclusion of the trial, the Honorable
26 Judge Baylson made a number of significant findings. Importantly, Judge Baylson found “Malibu
27 has satisfied its burden of proof with substantial evidence and deserves a large award.” *Malibu*

1 *Media, LLC v. John Does 1, 6, 13, 14*, CIV.A. 12-2078, 2013 WL 3038025 (E.D. Pa. June 18,
2 2013).

3 B. Plaintiff Does Not Solicit Settlements Prior to Serving a Defendant and Always Consents
4 to Allowing a John Doe Defendant to Proceed Anonymously

5 Plaintiff has filed this suit for the sole purpose of protecting and enforcing its copyrights.
6 *See* Exhibit A ¶ 31 (“The purpose of these lawsuits is to motivate people to pay for subscriptions
7 by deterring infringement and seek some reasonable compensation for the massive amount of
8 infringement of our copyrights.”). Plaintiff has no intention of embarrassing Defendant because
9 of the content of the works at issue and has instructed all of its counsel to always consent to
10 allowing a John Doe Defendant to proceed anonymously through discovery. Further, Plaintiff
11 does not extend settlement offers prior to serving a defendant with the complaint and in all of its
12 individual suits against a defendant, has only settled prior to serving when the defendant has
13 initiated the request. Should the Court wish to include language in its Order preventing Plaintiff
14 from initiating settlements with Defendant and allowing Defendant to proceed anonymously,
15 Plaintiff will not object.

16 C. The Infringer

17 Defendant’s Internet was used to infringe 25 of Plaintiff’s copyrighted movies between
18 12/31/2015 and 05/19/2016. *See* Exhibit A to Complaint. Defendant’s Internet has been used to
19 illegally download Plaintiff’s movies over the course of several months. By downloading each
20 of these movies through the BitTorrent protocol, Defendant simultaneously distributes these
21 movies to others, allowing other people to also steal Plaintiff’s movies. *See* Complaint, at ¶¶ 11-
22 25.

23 The length of time which Plaintiff’s investigator recorded Defendant infringing Plaintiff’s
24 movies demonstrates that the infringer was not a mere guest or passerby. It was someone with
25 access to Defendant’s Internet for a long period of time, consistently.

1 **III. ARGUMENT**

2 Except for circumstances not applicable here, a party may not propound discovery in
3 advance of a Rule 26(f) conference absent a court order. *See* Fed. R. Civ. P. 26(d)(1). Courts
4 have broad discretion to issue such an order for good cause. *See* Fed. R. Civ. P. 26(b)(1) (“For
5 good cause, the court may order discovery of any matter relevant to the subject matter involved
6 in the action.”); *Dallas Buyers Club, LLC v. Doe*-72.199.251.97, No. 15CV2033-BAS DHB, 2015
7 WL 5675540, at *1 (S.D. Cal. Sept. 25, 2015) (“Requests for early or expedited discovery are
8 granted upon a showing by the moving party of good cause.”).

9 **A. Circuit Courts Unanimously Permit Discovery to Identify John Doe Defendants**

10 Federal Circuit Courts have unanimously approved the procedure of suing John Doe
11 defendants and then using discovery to identify such defendants. *See, e.g., Young v. Transp.*
12 *Deputy Sheriff I*, 340 Fed. Appx. 368 (9th Cir. 2009) (“when the identities of alleged defendants
13 are not known before the filing of a complaint, the plaintiff should be given an opportunity
14 through [expedited] discovery to identify the unknown defendants, unless it is clear that discovery
15 would not uncover the identities”); *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592 (1st Cir.
16 2011) (“A plaintiff who is unaware of the identity of the person who wronged her can . . . proceed
17 against a ‘John Doe’ . . . when discovery is likely to reveal the identity of the correct defendant”).
18 *Accord Brown v. Owens Corning Inv. Review Comm.*, 622 F.3d 564, 572 (6th Cir. 2010);
19 *Blakeslee v. Clinton County*, 336 Fed. Appx. 248, 250 (3d Cir. 2009); *Green v. Doe*, 260 Fed.
20 Appx. 717, 719 (5th Cir. 2007); *Davis v. Kelly*, 160 F.3d 917, 921 (2d Cir. 1998); *Krueger v.*
21 *Doe*, 162 F.3d 1173 (10th Cir. 1998); *Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992);
22 *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985); *Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir.
23 1980).

24 **B. Good Cause Exists to Grant the Motion**

25 “In the Ninth Circuit, courts use the ‘good cause’ standard to determine whether discovery
26 should be allowed to proceed prior to a Rule 26(f) conference. Good cause may be found where
27 the need for expedited discovery, in consideration of the administration of justice, outweighs the
28

1 prejudice to the responding party.” *UMG Recordings, Inc. v. Doe*, No. C 08-1193 SBA, 2008
 2 WL 4104214, at *4 (N.D. Cal. Sept. 3, 2008). “Courts routinely find the balance favors granting
 3 a plaintiff leave to take early discovery.” *Id.* “In such circumstances, the plaintiff should be given
 4 an opportunity through discovery to identify the unknown defendants, unless it is clear that
 5 discovery would not uncover the identities, or that the complaint would be dismissed on other
 6 grounds.” *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

7 In balancing the administration of justice with the prejudice to the responding party,
 8 “[a]nd specifically in internet infringement cases, ‘courts routinely find good cause exists to issue
 9 a Rule 45 subpoena to discover a Doe defendant’s identity prior to a Rule 26(f) conference, where
 10 a plaintiff makes a *prima facie* showing of infringement, there is no other way to identify a Doe
 11 defendant, and there is a risk an ISP will destroy its logs prior to the conference.’” *Bright Solutions*
 12 *for Dyslexia, Inc. v. Doe 1*, 2015 WL 5159125, at *1 (N.D. Cal. Sept. 2, 2015). Courts also
 13 consider “whether the plaintiff: (1) identifies the Doe defendant with sufficient specificity that
 14 the court can determine that the defendant is a real person who can be sued in federal court; (2)
 15 recounts the steps taken to locate and identify the defendant; (3) demonstrates that the action can
 16 withstand a motion to dismiss, and (4) proves that the discovery is likely to lead to identifying
 17 information that will permit service of process.” *Uber Technologies, Inc. v. Doe*, No. C 15-00908
 18 LB, 2015 WL 1205167, at *2 (N.D. Cal. Mar. 16, 2015); *see also Dallas Buyers Club, LLC v.*
 19 *Doe-72.199.251.97*, No. 15CV2033-BAS DHB, 2015 WL 5675540, at *2 (S.D. Cal. Sept. 25,
 20 2015) (analyzing similar factors).

21 As set forth below, Plaintiff establishes all of these factors.

22 1. *Plaintiff’s Prima Facie Claim for Copyright Infringement Withstands a Motion to*
 23 *Dismiss*

24 Here, Plaintiff’s Complaint withstands a motion to dismiss by alleging *prima facie* direct
 25 copyright infringement. *See* CM/ECF 1. To adequately allege such a claim, a plaintiff must
 26 allege: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of
 27 the copyrighted work. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Feist Publ’ns, Inc. v.*

1 *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Range Road Music, Inc. v. East Coast Foods,*
 2 *Inc.*, 668 F.3d 1148, 1153–54 (9th Cir. 2012); *Autodesk, Inc. v. ZWCAD Software Co., Ltd.*, No.
 3 5:14-cv-01409, 2015 WL 2265479, *5 (N.D. Cal. May, 13, 2015). Further, the use of a peer-to-
 4 peer file-sharing service (such as BitTorrent) to copy and distribute copyrighted works constitutes
 5 direct copyright infringement. *See* 17 U.S.C. § 106; *see also, In re Aimster Copyright Litig.*, 334
 6 F.3d 643, 645 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004) (“Teenagers and young adults
 7 who have access to the Internet like to swap computer files containing popular music. If the music
 8 is copyrighted, such swapping, which involves making and transmitting a digital copy of the
 9 music, infringes copyright.”).

10 Here, Plaintiff properly pleads a cause of action for copyright infringement by plausibly
 11 alleging:

12 31. Plaintiff is the owner of the Copyrights-in-Suit, as outlined in Exhibit B,
 13 each of which covers an original work of authorship.

14 32. By using BitTorrent, Defendant copied and distributed the constituent
 15 elements of each of the original works covered by the Copyrights-in-Suit.

16 33. Plaintiff did not authorize, permit or consent to Defendant’s distribution of
 17 its works.

18 Complaint at ¶¶ 31-33. Plaintiff’s *prima facie* allegations of infringement are attested to by
 19 Plaintiff’s investigator, IPP International UG’s employee, Tobias Fieser. *See* Declaration of
 20 Tobias Fieser in Support of Plaintiff’s Motion for Leave to Serve Third Party Subpoenas Prior to
 21 a Rule 26(f) Conference (“Fieser Declaration”), at ¶¶ 14–16, attached hereto as Exhibit “C.” And,
 22 each digital file, as identified by a unique cryptographic file hash value, has been verified to be a
 23 copy or contain copies of one of Plaintiff’s copyrighted works. *Id.*, *see also* Declaration of Erin
 24 Sinclair at ¶¶ 10 – 11, attached hereto as Exhibit “D.” Moreover, during the first ever BitTorrent
 25 copyright lawsuit to reach trial, Judge Baylson concluded that Plaintiff’s investigation technology
 26 was valid. *See Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 782 (E.D. Pa.
 27 2013) (“I concluded that Malibu had expended considerable effort and expense to determine the
 28 IP addresses of the infringing parties, and the technology employed by its consultants—both of

whom were located in Germany and who testified at the trial of June 10, 2013—was valid.”).

Further, Plaintiff’s well-pled allegations constitute “a concrete, *prima facie* case of copyright infringement.” *Malibu Media, LLC*, No. 12 Civ. 3810, 2013 WL 3732839, *5 (S.D.N.Y. July 16, 2013); *see also, e.g., Malibu Media, LLC v. Dreev*, No. 6:13-cv-1959, CM/ECF 35 (M.D. Fla. Jan. 5, 2015) (“Plaintiff alleges that its investigator established an internet connection with the Defendant’s IP address, whereby Plaintiff’s investigator downloaded from Defendant copies of the protected works. From those facts, it is plausible that the Defendant is liable for the infringement.”); *Malibu Media, LLC v. Doe*, No. No. PWG-13-365, 2014 WL 7188822, *4 (D. Md. Dec. 16, 2014) (“[T]he factual allegations in the complaint require no inferences at all: Malibu has alleged that ‘[b]y using BitTorrent, Defendant copied and distributed the constituent elements of each of the original works covered by the Copyrights-in-Suit.’ If Defendant did so, and Malibu held a valid copyright in the Films, then no further inference is needed to find Defendant liable for copyright infringement.”).³ Accordingly, Plaintiff has met its obligation to plead a *prima facie* case.

Further, as explained in section III, B, 4, *infra*, Plaintiff has specifically identified Defendant by an IP address. See Complaint, at ¶¶ 2-7. “Therefore, at this early juncture, it appears Plaintiff has alleged sufficient facts to show it can likely withstand a motion to dismiss

³ *See, e.g., Malibu Media, LLC v. Doe*, No. 8:14-cv-2351, 2015 WL 574274, *2 (M.D. Fla. Feb. 11, 2015) (denying motion to dismiss); *Malibu Media, LLC v. Benitez*, No. 8:13-cv-03209, CM/ECF 26 (M.D. Fla. Aug. 7, 2014) (same); *Malibu Media, LLC v. Butler*, No. 13-cv-02707, CM/ECF 31 (D. Colo. April 24, 2014) (same); *Malibu Media, LLC v. Gilvin*, No. 3:13-cv-72, 2014 WL 1260110 (N.D. Ind. Mar. 26, 2014) (same); *Malibu Media, LLC v. Sanchez*, No. 13-12168, 2014 WL 172301, *3–4 (E.D. Mich. Jan. 15, 2014) (same); *Malibu Media, LLC v. Lowry*, No. 13-cv-01560, 2013 WL 6024371, *5–7 (D. Colo. Nov. 14, 2013) (same); *Malibu Media, LLC v. Killoran*, 2:13-cv-11446, CM/ECF 13 (E.D. Mich. Oct. 18, 2013) (same); *Malibu Media, LLC v. John Doe*, No. 2:13-cv-00055, CM/ECF 22 (N.D. Ind. Aug. 16, 2013) (same); *Malibu Media, LLC v. John Doe*, No. 13-12178, 2013 WL 3945978, *3–5 (E.D. Mich. July 31, 2013) (same); *Malibu Media, LLC v. Harris*, No. 1:12-cv-1117, 2013 WL 3780571 (S.D. Ind. July 18, 2013) (same); *Malibu Media LLC v. John Doe*, No. 12-3180, 2013 WL 3732839, *3–4 (S.D.N.Y. July 16, 2013) (same); *Malibu Media, LLC v. Pratt*, No. 1:12-cv-00621, CM/ECF 31 (W.D. Mich. Mar. 19, 2013) (same); *Malibu Media, LLC v. John Doe*, No. 12-2078, 2013 WL 30648, *4 (E.D. Pa. Jan. 3, 2013) (same); *Malibu Media, LLC v. Roy*, No. 1:12-cv-617, CM/ECF 24 (W.D. Mich. Jan. 3, 2013) (same); *Malibu Media, LLC v. Pelizzo*, No. 12-22768, 2012 WL 6680387, *1 (S.D. Fla. Dec. 21, 2012) (same).

1 for lack of personal jurisdiction because Defendant's IP address was traced to a location in this
 2 district.” *Dallas Buyers Club, LLC v. Doe-72.199.251.97*, No. 15CV2033-BAS DHB, 2015 WL
 3 5675540, at *3 (S.D. Cal. Sept. 25, 2015) (also finding the complaint would likely withstand a
 4 motion to for improper venue). Further, in copyright cases, venue is proper “in the district in
 5 which the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a). “The Ninth
 6 Circuit interprets this statutory provision to allow venue ‘in any judicial district in which the
 7 defendant would be amenable to personal jurisdiction if the district were a separate state.’”
 8 *Dallas Buyers Club, LLC v. Doe-72.199.251.97*, 2015 WL 5675540, at *3 (quoting *Brayton*
 9 *Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)). Because Plaintiff’s
 10 Complaint sufficiently alleges facts showing that Defendant’s IP Address was traced to a location
 11 within this District, Plaintiff’s Complaint will likely survive a motion to dismiss for lack of
 12 jurisdiction or improper venue.

13 2. *No Alternative Means Exist to Obtain Defendant’s True Identity*

14 Second, Plaintiff knows Defendant only by his or her IP address and has no way to
 15 ascertain Defendant’s identity other than by subpoenaing the ISP. “Postponing disclosure of
 16 information until the normal course of discovery is not an option in the instant case because,
 17 without disclosure of Defendants' names and contact information, the litigation cannot proceed to
 18 that stage.” *UMG Recordings, Inc.*, 2006 WL 1343597, at *1. “As to IP addresses, expedited
 19 discovery is appropriate because the addresses can assist in the identification of Doe defendants.”
 20 *Assef v. Does 1-10*, No. 15-CV-01960-MEJ, 2015 WL 3430241, at *2 (N.D. Cal. May 28, 2015).

21 Unlike phone numbers or license plates, there are no publicly-available databases or
 22 “yellow pages” that can identify an individual by an IP address. Rather, the ISP responsible for
 23 assigning a given IP address is the only entity that maintains records that make it possible to
 24 “know who an address is assigned to and how to get in contact with them.” *Beginner’s Guide to*
 25 *Internet Protocol (IP) Addresses* at p. 4; *American Registry for Internet Numbers Number*

1 *Resource Policy Manual* at 4.2.⁴ As explained by Plaintiff's forensic expert, who spent eleven
 2 years investigating computer offenses: "Once provided with the IP Address, plus the date and
 3 time of the detected and documented activity, ISPs can use their subscriber logs to identify the
 4 name, address, email address and phone number of the applicable subscriber in control of that IP
 5 address at the stipulated date and time." *See* Declaration of Patrick Paige at ¶ 15 (Exhibit B).

6 That only ISPs are able to identify individuals by IP addresses was reaffirmed by Jason
 7 Weinstein, Deputy Assistant Attorney General, when he testified before Congress: "[ISPs']
 8 records are the only available evidence that allows us to investigate who committed [wrongs] on
 9 the Internet. They may be the only way to learn, for example, that a certain Internet address was
 10 used by a particular human being . . ."⁵

11 Similarly, courts in online peer-to-peer copyright infringement cases repeatedly and
 12 unanimously acknowledge that the *only* way for a plaintiff to proceed against a doe defendant is
 13 to subpoena the responsible ISP to obtain the subscriber information. "Plaintiffs have no other
 14 way to obtain this most basic information, which is necessary to advance the lawsuit by enabling
 15 Plaintiffs to effect service of process." *UMG Recordings, Inc.*, 2006 WL 1343597, at *1. *See*
 16 *also, e.g., Cobbler Nevada, LLC v. Does*, No. 2:15-cv-11871, 2015 WL 4276082, *1 (E.D. Mich.
 17 July 14, 2015) (allowing a copyright holder to subpoena an ISP to identify the subscriber of an
 18 infringing IP address, recognizing that the identifying information was otherwise unavailable); *In*
 19 *Re Malibu Media*, No. 15-cv-1855, 2015 WL 3605834, *4 (E.D.N.Y. June 8, 2015) (same);
 20 *Rotten Records, Inc.*, No. 1:15-cv-0446, 2015 WL 3540007, *2 (W.D.N.Y. June 4, 2015) (same);
 21 *Manny Film, LLC v. Doe*, No. 15-80306-Civ, 2015 WL 2411201, *1 (S.D. Fla. May 20, 2015)
 22 (same); *Malibu Media, LLC v. Doe*, No. 2:13-cv-836, 2014 WL 1292692, *2 (M.D. Fla. Mar. 31,

23
 24 ⁴ Available at <https://www.icann.org/en/system/files/files/ip-addresses-beginners-guide-04mar11-en.pdf>.

25 ⁵ Testimony before the Committee on Judiciary Subcommittee on Crime, Terrorism, and
 26 Homeland Security, available at
 27 <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/01/25/11/01-25-11-crm-weinstein-testimony-re-data-retention-as-a-tool-for-investigating-internet-child-pornography-and-other-internet-crimes.pdf>

2014) (same); *TCYK, LLC v. Does*, No. 3:13-cv-3927, 2013 WL 6475040, *2 (N.D. Tex. Dec. 10, 2013) (same); *Third Degree Films v. Does*, No. C 11-02768, 2011 WL 5374569, *2 (N.D. Cal. Nov. 4, 2011) (same); *Digital Sin, Inc. v. Does*, No. C 11-04397, 2011 WL 5362068, *2 (N.D. Cal. Nov. 4, 2011) (same); *see also, e.g., Voltage Pictures, LLC v. Does*, No. 13-cv-01121, 2013 WL 4028587, *3 (D. Colo. Aug. 7, 2013) (“The Court finds that Plaintiff lacks a viable alternative means of obtaining the information sought in the subpoena. While this information is not guaranteed to produce the identity of the infringer, **the Court can think of no other reasonable way of discovering the infringer than by permitting Plaintiff discovery into the identity of Doe[.]**”) (emphasis added).

3. *There is a Risk that Defendant’s ISP will not Retain Records Correlating Defendant’s True Identity*

Further, there is a real risk of lost data because the United States does not currently have any data retention laws requiring ISPs to maintain records for a specified period of time. This issue was brought to the forefront in testimony before Congress regarding data retention policies. Kate Dean, of the United States Internet Service Provider Association, commented on the “extremely complicated and burdensome” costs associated with “maintaining exponentially-increasing volumes of data[.]” *See* January 25, 2011 Statement before the Committee on Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.⁶ Jason Weinstein, Deputy Assistant Attorney General, likewise acknowledged that given the costs, ISPs often keep records only for a matter of “weeks, months” or “very briefly before being purged.” *See* January 25, 2011 Statement before the Committee on Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.⁷

Courts have also acknowledged the risk that the ISP will retain the data for only a limited time period: “[E]xpeditious discovery is appropriate because ISPs typically retain user activity logs

⁶ Available at http://judiciary.house.gov/_files/hearings/pdf/Dean01242011.pdf

⁷ Available at <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/01/25/11/01-25-11-crm-weinstein-testimony-re-data-retention-as-a-tool-for-investigating-internet-child-pornography-and-other-internet-crimes.pdf>

1 for only a limited period, ranging from as short as a few days to a few months, before erasing
 2 data. If the information is not disclosed before it is destroyed, Plaintiffs will forever lose their
 3 opportunity to pursue infringement claims against the people associated with these IP addresses.”
 4 *UMG Recordings, Inc.*, 2006 WL 1343597, at *1 (citation omitted). “Furthermore, there exists a
 5 high risk that the ISPs may destroy the information Plaintiff seeks and thereby preclude Plaintiff
 6 from discovering Defendants' true identities.” *AF Holdings LLC v. Does I-97*, No. C-11-03067-
 7 CW DMR, 2011 WL 2912909, at *2 (N.D. Cal. July 20, 2011).

8 To ameliorate some of this problem in the online copyright infringement context,
 9 Congress enacted certain provisions into the Digital Millennium Copyright Act (“DMCA”). To
 10 protect against the loss of an infringer’s identifying information and to ensure that ISPs cooperate
 11 with copyright holders, the DMCA affords ISPs with liability protections in exchange for their
 12 prompt assistance in identifying online copyright infringers. *See* S. REP. 105-190, 20; 47 U.S.C.
 13 § 551 *et seq*; *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 37 (D.D.C. 2013) *rev'd sub*
 14 *nom. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C.
 15 Cir. 2003). Thus, Defendant’s ISP can and will comply with Plaintiff’s requested subpoena to
 16 the extent that it is expeditiously issued while the responsive records are still maintained.

17 4. Plaintiff Identifies Defendant with Specificity

18 As set forth in Plaintiff’s Complaint, Plaintiff’s Investigator has identified Defendant with
 19 specificity by identifying Defendant’s IP Address and the date and time Defendant engaged in
 20 the distribution of Plaintiff’s works. *See* Exhibit A to the Complaint. Further, “Plaintiff used
 21 proven IP address geolocation technology which has consistently worked in similar cases to
 22 ensure that the Defendant’s acts of copyright infringement occurred using an Internet Protocol
 23 address (“IP address”) traced to a physical address located within this District.” *See* Complaint
 24 at ¶ 5. The location listed on the chart on Exhibit A to Plaintiff’s Complaint refers to the location
 25 of the Defendant. To explain, Plaintiff used Maxmind® Premium’s IP geolocation database to
 26 determine that Defendant properly resided in a location both within the state of California and in
 27

1 this District.⁸ Maxmind is not “software” or technology per se, rather, it is a database/list. *See*
 2 Exhibit E at ¶ 8. Maxmind determines through information directly from the ISPs or via other
 3 means which City and State and to which ISP a given IP traces. *Id.* Maxmind maintains and
 4 updates this list and sells access to it. *Id.* Plaintiff only forms its suits against defendants that
 5 have reputable Internet Service Providers (“ISPs”) which, from Plaintiff’s experience, have
 6 consistently traced to the city location provided by Maxmind. *Id.* at ¶ 9. Maxmind’s ISP tracing
 7 service is “about 95% accurate in the US.”⁹ Maxmind’s geolocation tracing service is “99.8%
 8 accurate on a country level, 90% accurate on a state level, 81% accurate on a city level for the US
 9 within a 50 kilometer radius.”¹⁰ Plaintiff traces the Doe Defendant’s IP address upon receiving
 10 the data from IPP. *See* Exhibit E at ¶ 12. Undersigned also traced the Doe Defendant’s IP address
 11 a second time immediately before filing Plaintiff’s first motion for leave to avoid any issues with
 12 dynamic IP addresses. *Id.* Immediately prior to filing Plaintiff’s renewed motion, the Doe
 13 Defendant’s IP address was traced again. *Id.* In this case, the IP address traced to this District
 14 each time. *Id.* at ¶ 13.

15 Undersigned knows Maxmind’s geolocation database is accurate because I reviewed each
 16 case filed by Malibu Media in the Northern District of California. *Id.* at ¶ 15. Attached as an
 17 Exhibit A to my declaration is a true and correct excel sheet which accurately lists each case filed
 18 by Malibu Media in the Northern District of California. *Id.* In each case, I reviewed (1) whether
 19 Malibu Media received the address of the John Doe Defendant from the Defendant’s ISP,
 20 Defendant’s counsel or Defendant himself; (2) whether the true address of the John Doe
 21 Defendant correctly traced to a location within the Northern District of California, thereby
 22 matching Maxmind’s geolocation trace; and (3) if Malibu Media had not received the true address
 23 of the defendant, the reason it did not. *Id.*

24
 25 ⁸ *See* Declaration of Henrik Mosesi, Esq., attached hereto as Exhibit “E.” This declaration also
 26 explains the ISP address assignment process and how Plaintiff knows the ISP which was assigned
 27 the IP address and the location of a Defendant using the IP address.

⁹ *See* <https://www.maxmind.com/en/geoip2-isp-database>

¹⁰ *See* <https://www.maxmind.com/en/geoip2-city>

1 Upon a review of Malibu Media's records, Malibu Media has filed 233 cases in the
 2 Northern District of California. *Id.* at ¶ 16. Of those 233 cases, in 109 cases Malibu Media
 3 learned the true address of the defendant and therefore was able to determine whether Maxmind's
 4 geolocation prediction was accurate. *Id.*

5 In 124 cases, Malibu Media either did not, or has not yet, received the address of the John
 6 Doe Defendant. *Id.* at ¶ 17. This is because in some cases defendants (through counsel) have
 7 chosen to settle Malibu Media's claims prior to the subpoena response being provided. *Id.* In
 8 other cases, Malibu Media dismissed its case prior to receiving a subpoena response because of
 9 either timing delays, failure by previous counsel to timely submit subpoenas, or the infringement
 10 date was out of the ISP's data retention. *Id.* And, in other cases Malibu Media has not yet been
 11 granted leave to serve a subpoena on the John Doe Defendant's ISP. *Id.*

12 Out of 109 cases filed in the Northern District of California where Malibu Media has
 13 received the name and address of a defendant, 109 times Maxmind correctly predicted that the
 14 defendant resided in the Northern District of California. *Id.* at ¶ 17. As of today's filing,
 15 Maxmind has correctly predicted the John Doe Defendant's district 100% of the time in the
 16 Northern District of California. *Id.* In every case where Plaintiff received the John Doe
 17 Defendant's identifying information either from the ISP, opposing counsel, or from defendant
 18 himself, Maxmind's city trace accurately traced to a city in the Northern District of California.
 19 *Id.*

20 Courts have previously held that "[w]hile such publicly available IP locators are not 100%
 21 accurate, they have been accepted as making out a prima facie case of personal jurisdiction."
 22 *Digital Sins, Inc. v. John Does 1-245*, No. 11 CIV. 8170 CM, 2012 WL 1744838, at *4 (S.D.N.Y.
 23 May 15, 2012). As set forth above, Maxmind's Geolocation database has consistently predicted
 24 the location of the Defendant 100% of the time in the Northern District of California. And, this
 25 same exact geolocation technology has also been relied upon by federal law enforcement. *See*
 26 *United States v. Tillotson*, 2:08-CR-33, 2008 WL 5140773 (E.D. Tenn. Dec. 2, 2008) (noting that
 27 Maxmind's database correctly identified the Defendant and is sufficient to establish probable
 28

1 cause); *United States v. Richardson*, 4:11CR3116, 2012 WL 10382 (D. Neb. Jan. 3, 2012) (used
2 by Homeland Security to identify the defendant).

3 Under these circumstances, Plaintiff has specifically identified Defendant as a person who
4 can be sued in this District. *See Malibu Media, LLC v. John Doe subscriber assigned IP address*
5 *162.231.61.76*, No. 3:16-cv-00781-JAH-BGS, CM/ECF 9, p. 8 (S.D. Cal. June 24, 2016)
6 (Holding that “Plaintiff [had] identified the Defendant, at this point, with sufficient specificity”
7 after it submitted a declaration which “clarified the geolocation process it employ[ed] through the
8 service Maxmind Premium geolocation database.”); *see also Cobbler Nevada, LLC v. Doe-*
9 *68.8.213.203*, No. 15-CV-2729-GPC (JMA), 2015 WL 9026554, at *2 (S.D. Cal. Dec. 15, 2015)
10 (“[A] plaintiff identifies Doe defendants with sufficient specificity by providing the unique IP
11 addresses assigned to an individual defendant on the day of the allegedly infringing conduct, and
12 by using ‘geolocation technology’ to trace the IP address to a physical point of origin.” (*citing*
13 *808 Holdings, LLC v. Collective of Dec. 29, 2011 Sharing Hash*, 2012 WL 1648838, at *4 (S.D.
14 Cal. May 4, 2012)); *see also Braun v. Primary Distrib. Doe No. 1*, No. 12-5812 MEJ, 2012 WL
15 6087179, at *2 (N.D. Cal. Dec. 6, 2012) (finding that under similar circumstances, “Plaintiff has
16 come forward with sufficient information demonstrating that the Defendants are real persons or
17 entities who may be sued in federal court.”).

18 5. Plaintiff has Taken Reasonable Steps To Identify Defendant

19 Plaintiff has diligently attempted to correlate Defendant’s IP address to Defendant by
20 searching for Defendant’s IP address on various web search tools, including basic search engines
21 like <http://www.google.com>. Plaintiff has further conducted its own diligent research on its
22 ability to identify Defendant by other means by reviewing numerous sources of authority, most
23 of which have been discussed above (*e.g.*, legislative reports, agency websites, informational
24 technology guides, governing case law, etc.). Plaintiff has also discussed the issue at length with
25 its computer forensics investigator, an individual who was tasked with the responsibility of
26 investigating and identifying cybercriminals for over ten years. Plaintiff has been unable to
27 identify any other way to go about obtaining the identities of its infringers and does not know
28

1 how else it could possibly enforce its copyrights from illegal piracy over the Internet. “This is the
 2 case because although publicly available data allowed Plaintiff to identify the specific ISP used
 3 by Defendant as well as the city associated with the IP address, it did not permit Plaintiff to
 4 ascertain the identity of the subscriber or actual defendant. Accordingly, Plaintiff appears to have
 5 investigated and obtained the data pertaining to the alleged infringement in a good faith effort to
 6 locate Defendant.” *Cobbler Nevada, LLC v. Doe*-68.8.213.203, No. 15-CV-2729-GPC (JMA),
 7 2015 WL 9026554, at *2 (S.D. Cal. Dec. 15, 2015).

8 6. *Plaintiff’s Subpoena is Likely to Lead to Identifying Information That Will Permit*
 9 *Service on Defendant*

10 This “factor examines whether Plaintiff has demonstrated that there is a reasonable
 11 likelihood that the discovery [it] requests will lead to the identification of Defendants such that it
 12 may effect service of process. As indicated above, Plaintiff contends that the key to locating the
 13 Defendants is through the IP addresses associated with the alleged activity on BitTorrent.
 14 Specifically, Plaintiff contends that because ISPs assign a unique IP address to each subscriber
 15 and retain subscriber activity records regarding the IP addresses assigned, the information sought
 16 in the subpoena will enable Plaintiff to serve Defendants and proceed with this case. Taking this
 17 into account, the Court finds that Plaintiff has made a sufficient showing as to this factor.” *Braun*,
 18 2012 WL 6087179, at *3 (citations omitted). Indeed, without the subpoenaed information,
 19 Plaintiff will not know who to serve.

20 C. Plaintiff’s Need for Expedited Discovery, in Consideration of the Administration of
 21 Justice, Outweighs Any Prejudice to Defendant or the ISP

22 Plaintiff’s need for expedited discovery, in consideration of the administration of justice,
 23 outweighs any prejudice to Defendant or the ISP. “Looking first at ‘the administration of justice,’
 24 without expedited discovery, Plaintiffs cannot identify Defendants, which means this matter
 25 cannot proceed forward, and Plaintiffs will continue to suffer ongoing, continuous injury due to
 26 Defendants’ illegal activities.” *Assef*, 2015 WL 3430241, at *3. “Moreover, the Court finds that
 27 the expedited discovery sought furthers the interests of justice and presents minimal
 28

inconvenience to the ISPs to which the subpoenas are directed.” *Braun*, 2012 WL 6087179, at *4.

1. *Defendant is Not Prejudiced Because Plaintiff’s Request is Narrowly Tailored*

Further, Plaintiff’s discovery request is narrowly tailored. Here, Plaintiff seeks to discover from the Defendant’s ISP the true name and address of the Defendant. This is all specific information in the possession of Defendant’s ISP that will enable Plaintiff to serve process on Defendant. Because the requested discovery is limited and specific, there is no prejudice to Defendant. *See Bright Solutions*, 2015 WL 4776113 at *3 (“[T]here is no prejudice to the defendant where the discovery request is narrowly tailored to only seek their identity”); *UMG Recordings, Inc.*, 2008 WL 4104214 at *4 (same). “Because the discovery request seeks only the names and contact information of the people associated with certain IP addresses at certain times, it is ‘sufficiently specific’ to establish a reasonable likelihood that it would lead to identifying information that would make possible service upon the defendants, without revealing more than is necessary.” *UMG Recordings, Inc.*, 2006 WL 1343597, at *3.

2. *Plaintiff’s Need to Ascertain Defendant’s Identity Outweighs Defendant’s Interest in Remaining Anonymous.*

Further, Plaintiff has a strong legitimate interest in protecting its copyrights. Defendant is a copyright infringer with no legitimate expectation of privacy in the subscriber information he provided to his ISP, much less in distributing the copyrighted work in question without permission. “[T]he right to anonymity is not absolute. Where anonymous speech is alleged to be unlawful, the speaker’s right to remain anonymous may give way to a plaintiff’s need to discover the speaker’s identity in order to pursue its claim. . . . [Thus], plaintiffs alleging widespread copyright infringement may discover the identities of individuals alleged to have illegally downloaded plaintiffs’ musical recordings” *Art of Living Found. v. Does 1-10*, No. 10-CV-05022-LHK, 2011 WL 5444622, at *4 (N.D. Cal. Nov. 9, 2011) (citing *Sony Music Entm’t v. Does*, 326 F. Supp.2d 556 (S.D.N.Y. 2004)); *John Wiley & Sons, Inc. v. Doe Nos. 1-30*, 284 F.R.D. 185, 191 (S.D.N.Y. 2012) (“ISP subscribers have a minimal expectation of privacy in the

1 transmission or distribution of copyrighted material.”). Thus, Plaintiff’s need for the subpoenaed
 2 information outweighs any interest Defendant has in remaining anonymous.

3 Under the circumstances, Plaintiff submits that it has established good cause and that the
 4 balancing of harms necessarily tilts in favor of granting expedited discovery so that Plaintiff can
 5 proceed with this litigation and enforce its copyrights. Indeed, the denial of Plaintiff’s motion for
 6 leave necessarily amounts to the functional equivalent of a dismissal of this action. *Cf. Malibu*
 7 *Media, LLC v. Doe*, No. 1:15-cv-01834 CM/ECF 19 (S.D.N.Y. July 20, 2015) (explaining that
 8 denying Plaintiff the ability to subpoena an internet service provider “would effectively end the
 9 litigation Malibu has been pursuing against Doe, because Malibu would not be able to serve
 10 Doe.”). Such a ruling runs counter to established authority and violates Plaintiff’s Due Process
 11 rights insofar as it would leave Plaintiff with valid copyrights but no way to enforce those rights
 12 over the Internet. *Cf. Marbury v. Madison*, 1 Cranch 137, 1803 WL 893, *17 (U.S. 1803) (“The
 13 very essence of civil liberty certainly consists in the right of every individual to claim the
 14 protection of the laws, whenever he received an injury.”); *Gillespie*, 629 F.2d at 642 (holding that
 15 courts should not dismiss suits against unnamed defendants or defendants identified only as John
 16 Does until the plaintiff is given “an opportunity through discovery to identify the unknown
 17 defendants”); *see also Davis*, 160 F.3d at 921 (same).

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiff respectfully requests this Court grant Plaintiff leave to
 20 issue a Rule 45 subpoena to Defendant’s ISP.

21 By: /s/ Henrik Mosesi
 22 Henrik Mosesi, Esq.
 23 LAW OFFICE OF HENRIK MOSESI
 24 Attorney for Plaintiff
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 28